IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

10 March 2022

CASE No: AIFC-C/CFI/2021/0012

UNICORN CROPS LIMITED PRIVATE COMPANY

Applicant

v

(1) KIALY AGRO-10 LIMITED LIABILITY PARTNERSHIP
(2) NOVOKUBANSKOYE LIMITED LIABILITY PARTNERSHIP
(3) SENIM ZHER LIMITED LIABILITY PARTNERSHIP
(4) ARKA ZERENDI LIMITED LIABILITY PARTNERSHIP
(5) KAMAGRO LIMITED LIABILITY PARTNERSHIP

Respondents

JUDGMENT AND ORDER

Justice of the Court:

Justice Andrew Spink QC

ORDER

1. **The Court directs pursuant to Regulations 27(2)(a) and/or 27(6) of the AIFC Court Regulations 2017 and/or Rule 1.7 of the AIFC Court Rules 2018 that for all purposes related to and/or consequential in this Order and Judgment:**

   (a) the Claim/Application Form in Case Number AIFC-C/CFI/2021/0012 ("the Claim Form") issued on 20 December 2021 shall be deemed to be a Claim Form issued under the "Abridged Procedure for Claims" set out in Part 23 of the AIFC Court Rules 2017 and, to the extent necessary, shall also stand as any application notice required for the purposes of making the application sought in the Claim Form;

   (b) the parties named as "Claimant 2", "Claimant 3", "Claimant 4", "Claimant 5" and "Claimant 6" in the Claim Form shall be deemed to be the Defendants to the claim brought by and the Respondents to the application made in the Claim Form (and to have each been properly served with the Claim Form for both the bringing of the claim and, to the extent necessary, the making of the application); and

   (c) the party named as "Claimant 1" in the Claim Form shall be deemed to be the Claimant to that claim and the Applicant to that application.

2. **The Court sanctions under section 124 of the AIFC Companies Regulations 2017 the proposed arrangement for a reconstruction involving the amalgamation of the Applicant with each of the Respondents.**

3. **Pursuant to section 126 of the AIFC Companies Regulations 2017 the Court orders that each of the Respondents be amalgamated with the Applicant on the basis set out in the five Amalgamation Agreements between the Applicant and each of the Respondents each of which is dated 23 August 2021.**

JUDGMENT

Introduction

1. By an application filed in Case Number AIFC-C/CFI/2021/0012 by Claim/Application Form dated 20 December 2021 ("**the Claim Form**"), the parties referred to in the Claim Form as (1) "Claimant 1", identified there as "Unicorn Crops Limited Private Company" and by Business Identification Number ("BIN") 190940900125 ("**the Company**"), (2) "Claimant 2", identified there as "Kialy Agro-10 Limited Liability Partnership" and by BIN 020240004012 ("**LLP 1**"), (3) "Claimant 3" identified there as "Novokubanskoye Limited Liability Partnership" and by BIN 000240002964 ("**LLP 2**"), (4) "Claimant 4" identified there as "Senim Zher Limited Liability Partnership" and by BIN 990540004311 ("**LLP 3**"), (5) "Claimant 5" identified there as "Arka Zerendi Limited Liability Partnership" and by BIN 011040005490 ("**LLP 4**") (also referred to in the documentation referred to in the Claim Form as "Arka Zerendy Limited Liability Partnership"), and (6) "Claimant 6" identified there as "Kamagro Limited Liability Partnership" and by BIN 011040005578 ("**LLP 5**") jointly seek:

   (a) an order under section 124 of the AIFC Companies Regulations 2017 ("**the AIFC Companies Regulations**") sanctioning an arrangement proposed between the Company and its 100% shareholder, Unicorn Holdings Limited (BIN 190940900125) ("**the Shareholder**") for a reconstruction involving the amalgamation of each of LLP 1, LLP 2, LLP 3, LLP 4 and LLP 5 with the Company; and

   (b) an order under section 126 of the AIFC Companies Regulations giving effect to the amalgamation of each of LLP 1, LLP 2, LLP 3, LLP 4 and LLP 5 with the Company (although section 126 is not expressly referred to in the application, this is the appropriate section of the AIFC Companies Regulations for the order sought in sub-paragraph (b) herein and I proceed on that basis).

Procedural matters

2. It is necessary for me to deal first with a preliminary procedural matter.

3. On its face, there is no Defendant to the claim brought by or Respondent to the application made in the Claim Form. In addition, it is not clear whether the Claim Form is intended to stand as a claim form issued pursuant to Part 4 of the AIFC Court Rules 2018 ("the AIFC Court Rules") (which sets out the general rules for commencing claims), alternatively pursuant to Part 23 of the AIFC Court Rules (which sets out the "Abridged Procedure for Claims"). The relevance of this is highlighted by Rules 6.1 and 6.2 of the AIFC Court Rules, which provide as follows in relation to the bringing of any application:

"6.1 When a party makes an application to the Court:
(1) before a claim is brought in accordance with Part 4, he shall issue and serve an Abridged Procedure Claim Form under Part 23 of the Rules, unless the Court orders otherwise;
(2) after a claim is brought in accordance with Part 4, he shall file and serve an application notice subject to the rules of this Part.

6.2 In this Part:
(1) 'application notice' means a document in which the applicant states his intention to seek a Court order; and
(2) 'respondent' means:
(a) the person against whom the order is sought; and
(b) such other person as the Court may direct."

4. If the Claim Form were to be treated by the Court as a claim form issued under Part 4 of the AIFC Court Rules not only would there have to be a defendant, who would have to be served, but various procedural steps would thereafter have to be followed following service of the Claim Form on the defendant, as set out in Part 4, including service of Particulars of Claim and a Defence in accordance with Part 11, none of which would be appropriate or necessary in a claim such as this. This claim, in which the only relief sought is an order on the single application brought under Sections 124 and 126 of the AIFC Company Regulations and which is unlikely to involve a substantial dispute of fact is much better suited to the "Abridged Procedure for Claims" set out in Part 23 of the AIFC Court Rules (see Rule 23.1(1)).

5. Were the Claim Form to be treated by the Court as one issued under Part 23, however, this would have the knock-on effect of engaging Rule 6.1(1) in relation to the making of an application, whereby it seems tolerably clear that no separate application notice is required if the necessary application is made in the Part 23 Claim Form (whereas a separate application notice would certainly be required if the proceedings had been commenced by a Part 4 claim form: see Rule 6.1(2)).

6. Furthermore, where the Part 23 "Abridged Procedure for Claims" is used, no Defence needs to be filed (see Rule 23.4(1)(a)).

7. Significantly, there is also provision in Rule 23.6 for a Practice Direction to be made setting out circumstances in which an "Abridged Procedure Claim Form" may be issued without naming a defendant. Although no such Practice Direction has yet been made, this confirms that, in accordance with the Overriding Objective set out in Rule 1.6 of the AIFC Court Rules, the policy underlying Rule 23.6 is to promote expeditious and efficient disposal of matters suitable for the Part 23 "Abridged Procedure for Claims" even, potentially, to the extent of disposing with the need for a Defendant altogether.

8. Absent a Practice Direction to that effect, I do not consider that the Court can proceed without a Defendant in this matter in the way contemplated specifically by Rule 23.6. However, having regard to the evident underlying policy to which I have referred, it does seem to me (and I conclude) that it is open

to the Court in the exercise of its relevant management powers to direct in an appropriate case that one or more of the "Claimants" named in the Claim Form be deemed to be the Defendant or Defendants to the claim brought and (to the extent necessary) the Respondent or Respondents to the application made by the Claim Form.

9. Those case management powers are to be found in Regulations 27(2)(a) (*"(2) The Court may: (a) make orders in matters over which it has jurisdiction to make any orders it considers appropriate, including in relation to the management of cases, interim orders, and enforcement;"*) and/or 27(6) (*"(6) The Court may waive any procedural requirements if it is satisfied that it is in accordance with the overriding objective to do so"*) of the AIFC Court Regulations as underpinned by Rules 1.7 and 1.8 of the AIFC Court Rules.

10. In my view, this is an appropriate case in which to take this approach because, as stated above in paragraph 5 of this Judgment, in bringing the application made in the Claim Form as five of the "Claimants", each of LLP 1, LLP 2, LLP 3, LLP 4 and LLP 5 can be deemed, at least as a matter of substance, to have indicated its consent to the application being made and disposed of in the manner sought in the Claim Form and, I would add, to the Court taking all necessary steps within its powers to facilitate that outcome. Consequently, it seems to me that no prejudice is caused – and the Overriding Objective is promoted - by making an order that puts that substantive intention into the proper procedural form. Accordingly, I propose to make the direction set out in paragraph 1 of the Order.

11. For the avoidance of doubt, paragraph 1(a) is included in the Order because Rule 23.5(1) of the AIFC Court Rules requires a Part 23 Claim Form to state that the claim is brought under the "Abridged Procedure for Claims". The Claim Form does not state this and so an order directing that it should nonetheless stand as a Part 23 Claim Form is required.

12. The consequence of paragraph 1(c) of the Order will be that it will be for the Company (as the deemed Claimant/Applicant) to take the follow-up steps required to be taken under Section 125(5) of the AIFC Companies Regulations.

The substantive application under Sections 124 and 126 of the AIFC Companies Regulations

13. I now turn to the substantive application for relief under Sections 124 and 126 of the AIFC Companies Regulations.

14. The Company is a Private Company incorporated in the Astana International Financial Centre (Document 1) and is a "Company" within the meaning of the AIFC Companies Regulations (see the definitions in paragraph 4 of schedule 1 to those Regulations). The Shareholder is also an AIFC incorporated Private

Company and is the sole shareholder in the Company (Document 2 and Claim Form Details of Claim/Application paragraph 2). The Company in turn holds the following percentage of the shares in the charter capital of each of the LLPs: LLP 1 - 99%; LLP 2 - 99%; LLP 3 – 99.09%; LLP 4 – 98.977%; LLP 5 - 99% (Documents 6, 5, 4, 8 and 7 respectively), each of which is a limited liability partnership registered under the legislation of the Republic of Kazakhstan (Document 3).

15. As outlined above and pursuant to paragraph 1 of the Court's order, the Company is the deemed Claimant to the claim brought by the Claim Form and the deemed Applicant to the application for orders under Section 124 and 126 of the AIFC Companies Regulations. Each of the five LLPs is a deemed Defendant/Respondent. The application is not opposed.

16. It is stated in the Claim Form Details of Claim/Application, supported by a statement of truth signed by the Company's authorised legal representative, Shynggys Beibituly Oralbayev, a Senior Associate of Grata Law Firm LLP, that the Shareholder and the Company have made an arrangement for the amalgamation of the LLPs with the Company (paragraph 3) and that the Shareholder has resolved that the LLPs should amalgamate with the Company (paragraph 6), the Company has resolved to amalgamate with the LLPs (paragraph 7) and that the participants in each of the LLPs, in each of which the Company is the majority shareholder, have resolved to amalgamate with the Company, to approve and conclude the relevant Agreement on Amalgamation applicable to each LLP, to notify their creditors of their amalgamation with the Company and to register the termination of their LLP activity upon amalgamation with the Company (paragraph 8).

17. It is also stated in the Claim Form Details of Claim/Application (paragraph 10) that the individual participants in the LLPs, who number in excess of 1,200 will receive between them, as part of the amalgamation process, a total of 3,000 "preferred shares of Class B" in the Company each of which share will have a nominal value of 600 USD.

18. Although this is not a matter addressed expressly in the Claim Form Details of Claim/Application, it is to be noted:

    (a) that, while Section 124(2) of the AIFC Companies Regulations empowers the Court to order a meeting of the shareholders of the Company, no such order is required in this case because the sole shareholder has already approved the proposed procedure, as indicated above;

    (b) further, that the requirement under Section 124(3) that a majority representing three-quarters of the votes of the shareholders of the Company present and voting at the shareholders' meeting has been met.

19. Documents filed in support of the application include:

(a) the Company's standard Articles of Association (Document 1);

(b) the resolution of the shareholders of the Shareholder confirming, amongst other matters, the Shareholder's decision to amalgamate the LLPs with the Company, to approve each of the five Agreements on Amalgamation on behalf of the Company and to notify the Company's creditors about the amalgamation (Document 2);

(c) the resolution of the Shareholder on behalf of the Company in like terms to the resolution referred to in paragraph 20(b) above (Document 3);

(d) minutes of the Extraordinary General Meetings of the participants in each of the LLPs each held on 23 August 2021 approving the resolutions summarised in paragraph 17 above (Documents 4 to 8);

(e) notifications to the creditors of each of the LLPs about the amalgamation (Documents 9 to 99):

(f) the five Agreements on Amalgamation between the Company and each of the LLPs, dated 23 August 2021 (Documents 100 to 104).

20. Each of the Agreements on Amalgamation dated 23 August 2021 describes an agreement between the relevant LLP and the Company to undertake a "reorganisation process" involving the amalgamation of the LLP with the Company with a transfer of all the LLP's rights and obligations to the Company, such that the Company will become the legal successor of the relevant LLP to all the obligations of the LLP (Clause 6.1) after which each LLP will be excluded from the National Register of Business Identification Numbers of the Republic of Kazakhstan (Clause 6.2). Each Agreement on Amalgamation also contains a summary of the basic financial data set out in the balance sheets of the Company and the relevant LLP (Clauses 3.1 and 3.2). Such basic financial data relating to the Company and all of the five LLPs is also set out in each of the notifications to creditors referred to in paragraph 19(e) above.

21. I am satisfied that Section 124 of the AIFC Companies Regulations applies in this case, in that the matters summarised above constitute an arrangement proposed between the Company and its 100% shareholder, Unicorn Holdings Limited (Section 124(1)(b)).

22. There is no application for the Court to order that a meeting of shareholders be held to vote on the proposal (Section 124(2)), and I take the view that no such order is needed, since the information provided to the Court is that a meeting has already been held at which the Shareholder (being the sole shareholder in the Company) has already passed a resolution in favour of the proposal (Documents 2 and 3).

23. The Court has not been informed of any objection to the proposal. Moreover the proposal appears adequately to protect the position of third parties by the transfer of all obligations of the LLP to the Company in circumstances where (a) all those creditors in respect of whom information has been provided to the Court have been notified of the transfer by each LLP to the Company of that LLP's respective liabilities owed to each of those creditors, (b) each of those creditors has been notified of the basic financial data on the balance sheets of the Company and all of the LLPs, (c) the Court has not been informed of any objection having been received from any creditors, and (d) the Company and each of the LLPs consent to the proposal, and in particular to the transfer of all of each LLP's obligations to the Company, the Company and the relevant LLP having disclosed to each other in the Agreement on Amalgamation basic financial data from each of their respective balance sheets.

24. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under Section 124(3) of the AIFC Companies Regulations.

25. Section 126 of the AIFC Companies Regulations provides that if an application is made to the Court under Section 124 for the sanctioning of an arrangement between a Company and its shareholders, *"the Court may make any orders as it considers appropriate to facilitate the ... arrangement, including a reconstruction of the Company, or an amalgamation of the Company with any other Company"*. It provides further that *"in this section Company may be taken to include a Body Corporate incorporated outside the AIFC"*.

26. This raises the question of whether the Court has power to make an order under Section 126 where, as here, some of the entities to be involved in the amalgamation, namely each of the LLPs, is neither a *"Company"* in its primary sense of being a *"Private Company or a Public Company"* incorporated in the AIFC (as per paragraph 4 of Schedule 1 to the AIFC Companies Regulations) nor a *"Body Corporate incorporated outside the AIFC"* because it is a limited liability partnership rather than a body corporate. As to this, I respectfully agree with and adopt the approach to the making of the Section 126 part of the Order taken by Justice Sir Stephen Richards in AIFC Court Case No. AIFC-C/CFI/2021/0002 at [11] in his Judgment, where he said:

> *"The amalgamation of the LLP with the Company is at the heart of the proposed arrangement and it is appropriate in my view for the amalgamation to take place to facilitate the arrangement. An amalgamation involving a limited partnership registered outside the AIFC does not fall within the express wording of the section,* ***but that wording is not exhaustive of the forms of amalgamation that may be ordered*** *("including ... an amalgamation of the Company with any other Company"). I see no reason of principle why an order should not extend in an appropriate case to the amalgamation*

of a Company with a limited partnership, nor why a limited partnership registered outside the AIFC should be in any worse a position in that respect than a body corporate incorporated outside the AIFC." (emphasis added)

27. I therefore conclude that the Court should make an order under Section 126 of the AIFC Companies Regulations that the LLPs be amalgamated with the Company on the basis set out in the Amalgamation Agreement between them dated 23 August 2021.

28. For the avoidance of doubt, the orders made by the Court necessarily serve also to confirm acceptance by the Court of jurisdiction to make the orders sought in the application (see paragraph 1 of Section 3 of the Claim Form "Remedy Sought").

By the Court,

Andrew Spink QC, Justice, AIFC Court

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

4 March 2022

CASE No: AIFC-C/CFI/2021/0011

WEMINING LIMITED

Applicant

v

WEMINING LLP

Respondent

JUDGMENT AND ORDER

Justice of the Court:

Justice Andrew Spink QC

ORDER

1. **The Court directs pursuant to Regulations 27(2)(a) and/or 27(6) of the AIFC Court Regulations 2017 and/or Rule 1.7 of the AIFC Court Rules 2018 that for all purposes related to and/or consequential on this Order and Judgment:**

   (a) the Claim/Application Form in Case Number AIFC-C/CFI/2021/0011 ("the Claim Form") issued on 6 December 2021 shall be deemed to be a Claim Form issued under the 'Abridged Procedure' set out in Part 23 of the AIFC Court Rules 2017 and, to the extent necessary, shall also stand as any application notice required for the purposes of making the application sought in the Claim Form;

   (b) the party named as "Claimant 2" in the Claim Form shall be deemed to be the Defendant to the claim brought by and the Respondent to the application made in the Claim Form (and to have been properly served with the Claim Form for both the bringing of the claim and, to the extent necessary, the making of the application); and

   (c) the party named as "Claimant 1" in the Claim Form shall be deemed to be the Claimant to that claim and the Applicant to that application.

2. **The Court sanctions under section 124 of the AIFC Companies Regulations 2017 the proposed arrangement for a reconstruction involving the amalgamation of the Applicant with the Respondent.**

3. **Pursuant to section 126 of the AIFC Companies Regulations 2017 the Court orders that the Respondent be amalgamated with the Applicant on the basis set out in the Amalgamation Agreement between them dated 17 November 2021.**

Court

JUDGMENT

Introduction

1. By an application filed in Case Number AIFC-C/CFI/2021/0011 by Claim/Application Form dated 6 December 2021 ("the Claim Form"), the parties referred to in the Claim Form as (1) "Claimant 1", identified there as "Wemining Limited" and by Business Identification Number ("BIN") 200840900057 ("the Company") and (2) "Claimant 2", identified there as "TOO 'Wemining"' and by BIN 200740013652 jointly seek:

   (a) an order under section 124 of the AIFC Companies Regulations 2017 ("the AIFC Companies Regulations") sanctioning an arrangement proposed between the Company and its 100% shareholder, Kim Jin Min ("the Shareholder") for a reconstruction involving the amalgamation of Wemining Limited Liability Partnership ("the LLP") with the Company; and

   (b) an order under section 126 of the AIFC Companies Regulations giving effect to the amalgamation of the LLP with the Company (although section 126 is not expressly referred to in the application, this is the appropriate section of the AIFC Companies Regulations for the order sought in subparagraph (b) herein and I proceed on that basis).

Procedural matters

2. It is necessary for me to deal first with two preliminary procedural matters.

3. First, the name given to "Claimant 1" in the title of the Claim Form ("TOO 'Wemining'"), which it is clear is intended to be a reference to the LLP, appears to be different to the name given to the LLP elsewhere in the Claim Form and the accompanying documentation, where the LLP is referred to as "Wemining Limited Liability Partnership" or "Wemining LLP". However, it is clear that 'TOO "Wemining"' and "Wemining Limited Liability Partnership/LLP" are one and the same entity because they are both identified in the papers before me by the same BIN, 200740013652 (see, for example, Document 1, which is the "Certificate of state registration of a legal entity" for "Wemining LLP" identifying this entity by reference to BIN200740013652). The explanation for this is apparent from Document 7 (the Articles of Association of the LLP). which make it clear that "TOO 'Wemining'" is the Russian name for the LLP, whereas "Wemining LLP" is the English name.

4. I therefore proceed on this basis, such that the LLP is a party to the Claim Form and, in bringing the application made in the Claim Form as one of the 'Claimants', can be deemed to have indicated its

consent to the application being made and disposed of in the manner sought in the Claim Form. It is relevant to note this not only for good order but because this feeds into the second preliminary procedural matter with which I have to deal, to which I now turn.

5. Secondly, of somewhat more substance is the fact that, on its face, there is no Defendant to the claim brought by or Respondent to the application made in the Claim Form. In addition, it is not clear whether the Claim Form is intended to stand as a claim form issued pursuant to Part 4 of the AIFC Rules 2018 ("the AIFC Rules") (which sets out the general rules for commencing claims), alternatively pursuant to Part 23 of the AIFC Rules (which sets out the "Abridged Procedure for Claims"). The relevance of this is highlighted by Rules 6.1 and 6.2 of the AIFC Rules, which provide as follows in relation to the bringing of any application:

> *"6.1 When a party makes an application to the Court:*
> *(1) before a claim is brought in accordance with Part 4, he shall issue and serve an Abridged Procedure Claim Form under Part 23 of the Rules, unless the Court orders otherwise;*
> *(2) after a claim is brought in accordance with Part 4, he shall file and serve an application notice subject to the rules of this Part.*
>
> *6.2 In this Part:*
> *(1) 'application notice' means a document in which the applicant states his intention to seek a Court order; and*
> *(2) 'respondent' means:*
> *(a) the person against whom the order is sought; and*
> *(b) such other person as the Court may direct."*

6. If the Claim Form were to be treated by the Court as a claim form issued under Part 4 of the AIFC Rules not only would there have to be a defendant, who would have to be served, but various procedural steps would thereafter have to be followed following service of the Claim Form on the defendant, as set out in Part 4, including service of Particulars of Claim and a Defence in accordance with Part 11, none of which would be appropriate or necessary in a claim such as this. This claim, in which the only relief sought is an order on the single application brought under Sections 124 and 126 of the AIFC Company Regulations and which is unlikely to involve a substantial dispute of fact is much better suited to the "Abridged Procedure for Claims" set out in Part 23 of the AIFC Rules (see Rule 23.1(1)).

7. Were the Claim Form to be treated by the Court as one issued under Part 23, however, this would have the knock-on effect of engaging Rule 6.1(1) in relation to the making of an application, whereby it seems tolerably clear that no separate application notice is required if the necessary application is made in the Part 23 Claim Form (whereas a separate application notice would certainly be required if the proceedings had been commenced by a Part 4 claim form: see Rule 6.1(2)).

8. Furthermore, where the Part 23 "Abridged Procedure for Claims" is used, no Defence needs to be filed (see Rule 23.4(1)(a)).

9. Significantly, there is also provision in Rule 23.6 for a Practice Direction to be made setting out circumstances in which an 'Abridged Procedure Claim Form' may be issued without naming a defendant. Although no such Practice Direction has yet been made, this confirms that, in accordance with the Overriding Objective set out in Rule 1.6 of the AIFC Rules, the policy underlying Rule 23.6 is to promote expeditious and efficient disposal of matters suitable for the Part 23 "Abridged Procedure for Claims" even, potentially, to the extent of disposing with the need for a Defendant altogether.

10. Absent a Practice Direction to that effect, I do not consider that the Court can proceed without a Defendant in this matter in the way contemplated specifically by Rule 23.6. However, having regard to the evident underlying policy to which I have referred, it does seem to me (and I conclude) that it is open to the Court in the exercise of its relevant management powers to direct in an appropriate case that one of the "Claimants" named in the Claim Form be deemed to be the Defendant to the claim brought and (to the extent necessary) the Respondent to the application made by the Claim Form.

11. Those case management powers are to be found in Regulations 27(2)(a) (*"(2) The Court may: (a) make orders in matters over which it has jurisdiction to make any orders it considers appropriate, including in relation to the management of cases, interim orders, and enforcement;"*) and/or 27(6) *("(6) The Court may waive any procedural requirements if it is satisfied that it is in accordance with the overriding objective to do so"*) of the AIFC Court Regulations as underpinned by Rules 1.7 and 1.8 of the AIFC Court Rules.

12. In my view, this is an appropriate case in which to take this approach because, as stated above in paragraph 6 of this Judgment, in bringing the application made in the Claim Form as one of the "Claimants", the LLP can be deemed, at least as a matter of substance, to have indicated its consent to the application being made and disposed of in the manner sought in the Claim Form and, I would add, to the Court taking all necessary steps within its powers to facilitate that outcome. Consequently, it seems to me that no prejudice is caused – and the Overriding Objective is promoted - by making an order that puts that substantive intention into the proper procedural form. Accordingly, I propose to make the direction set out in paragraph 1 of the Order.

13. For the avoidance of doubt, paragraph 1(a) is included in the Order because Rule 23.5(1) of the AIFC requires a Part 23 Claim Form to state that the claim is brought under the "Abridged Procedure for Claims". The Claim Form does not state this and so an order directing that it should nonetheless stand as a Part 23 Claim Form is required.

14. The consequence of paragraph 1(c) of the Order will be that it will be for the Company (as the deemed Claimant/Applicant) to take the follow-up steps required to be taken under Section 125(5) of the AIFC Companies Regulations.

The substantive application under Sections 124 and 126 of the AIFC Companies Regulations

15. I now return to the substantive application for relief under Sections 124 and 126 of the AIFC Companies Regulations.

16. The Company is a Private Company incorporated in the Astana International Financial Centre (Document 2) and is a "Company" within the meaning of the AIFC Companies Regulations (see the definitions in paragraph 4 of schedule 1 to those Regulations). The Shareholder is a natural person, who is the "incorporating" and sole shareholder in the Company (Document 4 and Details of Claim/Application paragraph 2). The LLP is a legal entity registered outside the AIFC and operating in accordance with the legislation of the Republic of Kazakhstan (Document 1; Details of Claim/Application paragraph 3; Document 7). The Shareholder is also the sole founder of shareholder of and/or sole participant in the LLP (Document 1; Details of Claim/Application paragraph 3; Document 7).

17. As outlined above and pursuant to paragraph 1 of the Court's order, the Company is the deemed Claimant to the claim brought by the Claim Form and the deemed Applicant to the application for orders under Section 124 and 126 of the AIFC Companies Regulations. The LLP is the deemed Defendant/Respondent. The application is not opposed.

18. It is stated in the Details of Claim/Application, supported by a statement of truth signed by the Company's authorised legal representative, Gaussar Abduova of International Law Company Limited, that the Shareholder has agreed on behalf of the Company and the LLP to the amalgamation of the LLP with the Company (paragraphs 4 and 5). It is stated further that, although Section 124(2) of the AIFC Companies Regulations empowers the Court to order a shareholders' meeting, no such order is required in this case because the sole shareholder has already approved the proposed procedure (paragraph 7), further that the requirement under Section 124(3) that a majority representing three-quarters of the votes of the shareholders present and voting at the shareholders' meeting has been met, further that the LLP has obtained the consent of all creditors to the transfer of obligations from the LLP to the Company, notice of the offer made by the LLP to transfer those obligations to the Company and the Company's assent thereto having been published.

19. Documents filed in support of the application include:

(a) the LLP's Articles of Association, approved by the sole participant on 16 July 2020 (Document 7), and the Company's Articles of Association (Document 8);

(b) an Amalgamation Agreement between the Company and the LLP, dated 17 November 2021 (Document 5);

(c) a record, dated 17 November 2021, of the resolution of the Shareholder in his capacity as "incorporating shareholder" of the Company, that the Company desires to amalgamate with the LLP and continue as one company and that the Company assumes all liabilities of the LLP in view of the amalgamation (Document 4);

(d) a record, dated 17 November 2021, of the decision of the Shareholder, in his capacity as "sole founder" of the LLP, accepting the reorganisation of the LLP in the form of a merger with the Company with all obligations of the LLP being assumed by the Company (Document 3); and

(e) letters from various creditors of and/or contracting counterparties with LLP consenting to the transfer by LLP to the Company of LLP's respective liabilities or contractual obligations owed to each of those creditors/counterparties (Documents 10, 11, 12, 13, 14 and 15).

20. The Amalgamation Agreement dated 17 November 2021 describes an agreement between the LLP and the Company to merge by combining their businesses and assets and thereafter to continue in existence combined together as the Company, with property or each of the LLP and the Company remaining the property of the Company (Clause 3.2), the Company continuing to be liable for the obligations of the LLP (Clause 3.3), and existing grounds for any claim or "obligation to pursue" that may be vested in LLP being assigned to the Company (Clause 3.4). (Note that Clause 3.4 is confusingly drafted, or at least translated, but I consider can only sensibly be construed in the way set out in the previous sentence of this Judgment). It is expressly recorded in the Amalgamation Agreement that the Company and the LLP have fully disclosed to each other all of their respective assets and liabilities.

21. I am satisfied that Section 124 of the AIFC Companies Regulations applies in this case, in that the matters summarised above constitute an arrangement proposed between the Company and its 100% shareholder, Kim Jin-Min (Section 124(1)(b)).

22. There is no application for the Court to order that a meeting of shareholders be held to vote on the proposal (Section 124(2)), and I take the view that no such order is needed, since the information provided to the Court is that a meeting has already been held at which the Shareholder (being the sole shareholder in the Company) has already passed a resolution in favour of the proposal (Document 4).

23. The Court has not been informed of any objection to the proposal. Moreover the proposal appears adequately to protect the position of third parties by the transfer of all obligations of the LLP to the Company in circumstances where (a) all those creditors/contracting counterparties in respect of whom information has been provided to the Court have agreed to the transfer by LLP to the Company of LLP's respective liabilities or contractual obligations owed to each of those creditors/counterparties, (b) more generally, the consent of all of LLP's creditors to the transfer of its obligations to the Company has been received, (c) each of the Company and the LLP consent to the proposal, and in particular to the transfer of all the LLP's obligations to the Company, the Company and the LLP having first fully disclosed to each other all of their respective assets and liabilities, and (d) notice of the offer made by the LLP to transfer its obligations to the Company and the Company's assent thereto has been published.

24. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under Section 124(3) of the AIFC Companies Regulations.

25. Section 126 of the AIFC Companies Regulations provides that if an application is made to the Court under Section 124 for the sanctioning of an arrangement between a Company and its shareholders, *"the Court may make any orders as it considers appropriate to facilitate the ... arrangement, including a reconstruction of the Company, or an amalgamation of the Company with any other Company"*. It provides further that *"in this section Company may be taken to include a Body Corporate incorporated outside the AIFC"*.

26. This raises the question of whether the Court has power to make an order under Section 126 where, as here, one of the entities to be involved in the amalgamation, namely the LLP, is neither a *"Company"* in its primary sense of being a *"Private Company or a Public Company"* incorporated in the AIFC (as per paragraph 4 of Schedule 1 to the AIFC Companies Regulations) nor a *"Body Corporate incorporated outside the AIFC"* because it is a limited liability partnership rather than a body corporate. As to this, I respectfully agree with and adopt the approach to the making of the Section 126 part of the Order taken by Justice Sir Stephen Richards in AIFC Court Case No. AIFC-C/CFI/2021/0002 at [11] in his Judgment, where he said:

> *"The amalgamation of the LLP with the Company is at the heart of the proposed arrangement and it is appropriate in my view for the amalgamation to take place to facilitate the arrangement. An amalgamation involving a limited partnership registered outside the AIFC does not fall within the express wording of the section,* ***but that wording is not exhaustive of the forms of amalgamation that may be ordered*** *("including ... an amalgamation of the Company with any other Company"). I see no reason of principle why an order should not extend in an appropriate case to the amalgamation*

of a Company with a limited partnership, nor why a limited partnership registered outside the AIFC should be in any worse a position in that respect than a body corporate incorporated outside the AIFC." (emphasis added)

27. I therefore conclude that the Court should make an order under Section 126 of the AIFC Companies Regulations that the LLP be amalgamated with the Company on the basis set out in the Amalgamation Agreement between them dated 17 November 2021.

By the Court,

Andrew Spink QC,
Justice, AIFC Court

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 March 2022

CASE No: AIFC-C/SCC/2021/010

ARMAN KUATOV

Claimant

v

PRIVATE COMPANY SERGEK DEVELOPMENT LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Patricia Edwards

ORDER

UPON the commencement of a Claim on 8 November 2021;

AND UPON the filing of a Defence on 22 November 2021;

AND UPON the Court making orders on 20 December 2021 and 3 February 2022;

IT IS ORDERED that:

1. The claim is dismissed in full.

2. No order as to costs.

JUDGMENT

1. On 12 June 2020, the parties signed an Employment Agreement. The agreement was initially for one year of work, commencing on 12 June 2020 (clause 2). Additional Agreement No 1 dated 27 November 2020 reduced the claimant's salary to 200,000 tenge a month from 1 December 2020.

2. By a letter dated 21 April 2021, the claimant asked for unpaid leave to care for a child, from 21 April to 30 December 2021. According to the claim, the claimant made several further requests thereafter, but I have not seen these. The child in question was born on 30 December 2018. (The claimant has since become father to a second child, born on 20 November 2021.)

3. In a letter dated 21 June 2021, the defendant responded "*In accordance with subparagraph 2) of paragraph 6.3 of the Employment Agreement, the Company refuses to give you an unpaid leave to take care of a child until the child reaches the age of three years*".

4. In a further letter dated 8 July 2021, the defendant wrote "*you need to go to work full-time from July 12, 2021*".

5. By a letter dated 23 July 2021, the claimant wrote "*After your refusal to let me to take an unpaid leave to care for a child until the child reaches the age of three, I ask you to terminate the employment contract with me on my initiative on July 23, 2021, the last working day is July 23, 2021*".

6. In a further letter dated Monday 4 October 2021, the claimant said "*after more than 2 months, my application remains not considered, and to date I have not received any response*" and asked for his application to be considered.

7. By a letter dated 12 October 2021, the defendant responded:

> *"Considering that you are absent from work for a long time without a valid reason (there are relevant acts) and ignore the employer without giving feedback, notifications of going to work were repeatedly sent to your place of residence, which were also ignored by you.*
>
> *Your actions on unauthorised dismissal, that is, unauthorised leaving the place of work before the expiration of the established periods after the warning about termination of the employment contract on your own initiative, is also a violation of the Labor Law.*
>
> *In this regard, in order to resolve the issue of terminating the labor agreement for positive reasons, you need to come to work and give explanations to the employer about the situation.*

Otherwise, the contract will be terminated on the initiative of the employer for negative reasons in accordance with labor law."

8. The claimant did not speak to the defendant as requested. Instead he filed this claim on 8 November 2021. The defendant filed a defence on 22 November 2021. I subsequently made orders permitting further information, documents and witness statements to be filed. The claimant filed further submissions and documents on 18 January 2022. As these were substantial, I considered it fair to allow the defendant an opportunity to respond, which it did on 11 February 2022. The claimant provided final submissions in response on 18 February 2022.

9. The defendant indicated that it would prefer a hearing with its legal representative. The claimant disagreed and said that he would have no representation and would be disadvantaged by a hearing. I consider that the parties have had considerable time to file any submissions and evidence relied upon and it is most appropriate now to proceed to judgment without a hearing.

Issue 1: Was the claimant entitled to unpaid leave?

a. Clause 6.3

10. Clause 6.3 provides:

"6.3 Maternity leave for men

1) The Employee who gives birth to a child and shall be entitled to paid leave of at least 5 working days' duration; this leave shall be paid as normal working days;

2) The Employee who has adopted a child under 3 months old shall be entitled to maternity leave in connection with adoption and shall be entitled to paid maternity leave according to the AIFC Regulations;

The childcare leave may be taken within 2 months from the child's birth;

The childcare leave shall be paid as normal working days;

The Employee may not receive compensation in lieu of leave".

11. The claimant contends, firstly, that clause 6.3 is not applicable at all because of errors of drafting or translation.

12. First, the claimant refers to the title of the sub-clause, "*maternity leave for men*", rather than calling it 'paternity' leave, and the fact it applies to an employee "*who gives birth to a child*", which men cannot do. However, it seems to me sufficiently clear that clause 6.3(1) intends to address

leave for men whose child is born (while clause 6.2 provides for "*Maternity leave for women*"). The claimant's interpretation would leave the clause with no purpose at all. As set out in the AIFC Contract Regulations, Regulation 53, "*Contract terms must be interpreted to give effect to all the terms rather than to deprive some of them of effect*".

13. In the alternative, the claimant contends that the part of clause 6.3 relied on by the defendant is not applicable to him.

14. The claimant's case is that the two month limitation applies only in the case of an adopted child. I am unable to accept that argument. It seems to me that the final three paragraphs of clause 6.3 were intended to apply to both subparagraphs (1) and (2) of the clause. All three limitations are readily applicable to both subparagraphs.

15. The first limitation requires leave to be taken "*within 2 months from the child's birth*". As the clause applies to adoption up to 3 months old, on the face of it this limitation applies more squarely to 6.3(1). It might properly be said to mean within two months of the child's birth *or adoption*. In any event, were the two month limitation not applicable to subparagraph (1), then there would be no apparent time limit at all on when the leave could be taken, in stark contrast to the short time limit in the case of adoption.

16. It is true that the second limitation, that the leave is to be paid as normal working days, duplicates the same proviso in subparagraph (1). But that appears to be no more than an inelegance of drafting.

17. Furthermore, the AIFC Employment Regulations includes the following provisions:

> "***39. Paternity leave and pay***
>
> *(1) An Employee who becomes a father to a newly-born child is entitled to paternity leave for a minimum period of 5 Business Days or, if the Employee is entitled to paternity leave for a longer period under the Employee's Contract of Employment, for that longer period.*
>
> *(2) The paternity leave must be taken within 2 months after the day of the child's birth.*
>
> *(3) During the minimum period of paternity leave under subsection (1), the Employer must pay the Employee at the Employee's normal Daily Wage.*
>
> (4) *The Employee cannot receive compensation in lieu of paternity leave.*"

18. The provisions of the contract mirror these provisions closely, which further suggests that they were each intended to apply in all cases, not just in the case of adoption.

19. The claimant also notes that sub-paragraph (1) appears in one box of the contract, while sub-paragraph (2) appears in a separate box together with the final sentences of Article 6.3. However, looking at other provisions of the contract, they are not always divided perfectly into such boxes (e.g. clauses 1.3 and 4.3), and to rely on these as changing the interpretation of the provisions would seem to me to attach undue significance to this feature of the drafting.

20. Accordingly, in my judgment, the claimant was not entitled to paternity leave under these provisions.

b. Article 100

21. The claimant argues that Article 100 of the Labour Code of the Republic of Kazakhstan is "*of a superior legal power over clauses of Employment Agreement*". Article 100 provides:

> *"**Article 100. Unpaid leave for child care until he reaches the age of three***
>
> *1. The employer is obliged to grant an unpaid leave to the worker for childcare until he reaches the age of three:*
>
> *1) at the choice of the parents - the mother or the father of the child;*
>
> *[…]*
>
> *2. An unpaid leave for child care until the age of three is granted on the basis of a written application of the employee with indication of its duration and provision of a birth certificate or other document confirming the birth of the child.*
>
> *The employee can use the leave to take care of the child until he reaches the age of three years in full or in parts. […]"*

22. Article 8 is entitled "Scope of this Code" and includes the following:

> *"2. This Code applies to employees, employees of the sending party, employers, as well as the receiving party, which are located on the territory of the Republic of Kazakhstan … unless otherwise provided by the laws of the Republic Kazakhstan …*
>
> *…*
>
> *4. Laws of the Republic of Kazakhstan shall not reduce the level of rights, freedoms and guarantees established by this Code."*

23. The claimant relies on Regulation 3 of the AIFC Employment Regulations, which states that the Regulations "*provide minimum employment standards for Employees who are based in, or ordinarily work in or from, the AIFC*".

24. As set out above, Regulation 39 provides that a new father "*is entitled to paternity leave for a minimum period of 5 Business Days or, if the Employee is entitled to paternity leave for a longer period under the Employee's Contract of Employment, for that longer period*".

25. The claimant further relies on Article 4(1)(3) of the AIFC Constitutional Statute:

> "***Article 4. Acting Law of the AIFC***
>
> *1. The Acting Law of the AIFC is based on the Constitution of the Republic of Kazakhstan and consists of: …*
>
> *1) this Constitutional Statute; and*
>
> *2) AIFC Acts, which are not inconsistent with this Constitutional Statute and which may be based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres, adopted by the AIFC Bodies in the exercise of the powers given by this Constitutional Statute; and*
>
> *3) the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts*".

26. It can be seen from this that the Labor Code of Kazakhstan applies to matters "*not governed*" by the AIFC Acts. However, paternity leave is governed by the AIFC Employment Regulations.[1] There is therefore no scope for the application of Article 100. The claimant was not entitled to paternity leave on this basis either.

Issue 2: Was the defendant obliged to pay the claimant's salary?

27. The claimant wrote to the defendant on 21 April 2021 asking for paternity leave to start the very same day. It appears to be common ground between the parties that the claimant has done no work since then. The last payment of salary was made on 5 May 2021.

28. The claimant is correct that the contract provides for salary to be paid in full and on time (clauses 4.1(8), 4.4(6), 5.2). Regulation 20 of the AIFC Employment Regulations provides that deductions from wages may only be made in limited circumstances, including if authorised "*under legislation that applies in the Astana International Financial Centre or under the Employee's Contract of Employment*".

[1] Article 1(4) provides that "*AIFC Act means an official written document, adopted by an AIFC Body, relating to the relationships between AIFC Participants, AIFC Bodies, their Employees, AIFC Participants and AIFC Bodies, AIFC Participants and their Employees or Employees of AIFC Bodies, AIFC Bodies and their Employees or Employees of AIFC Participants*". Accordingly, the AIFC Employment Regulations are an AIFC Act.

29. However, the obligation to pay salary is contingent on an employee working. The principle is sometimes expressed as one of "*no work, no pay*". This can be seen, for instance, in the decision of the House of Lords in Miles v Wakefield [1987] IRLR 193.[2] The claimant stopped working after expressing his desire to take paternity leave, to which he was not in fact entitled. The defendant was therefore entitled to stop paying his salary for so long as the claimant remained unwilling to work.

30. The same result can also be reached by looking at Regulation 79 of the AIFC Contract Regulations:

> *"79. Withholding performance*
>
> *(1) If the parties are to perform simultaneously, either party may withhold performance until the other party tenders performance.*
>
> *(2) If the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed."*

31. Payment of salary followed work by the claimant. The claimant did not work and therefore the defendant was not obliged to pay.

Issue 3: Disputes in relation to the workplace

32. The pleadings raise various issues as to whether the claimant was required to work in an office, whether a suitable workplace was provided for the claimant, and whether the defendant requested the claimant to go to the office contrary to one or more Resolutions of the Chief State Sanitary Doctor of the City of Nur-Sultan.

33. Clause 1.3 of the contract provides "*The place of execution of work under this Agreement: Nur-Sultan city*". The claimant says he did not attend an office for his entire period of work, from June 2020, and was never disciplined for this. He says the first time the defendant raised the issue was in July 2021. The defendant has not disputed that the claimant never worked from an office, nor provided any details of where else the claimant should have worked.

34. The defendant's letter of 8 July 2021 said "*you need to go to work full-time from July 12, 2021*". It is not clear from this short letter that this was actually a requirement to work from a particular location, rather than simply a request for the claimant to resume working as he had been doing.

[2] Pursuant to Article 13(6) of the AIFC Constitutional Statute, final judgments of the courts of other common law jurisdictions may be taken into account in this court.

35. The defendant's letter of 12 October 2021 asked the claimant to come to work to explain the situation in order the resolve the issue of terminating the contract, as requested by the claimant. The defendant has said in these proceedings that the claimant was asked to attend the office for his proper dismissal and "*to transfer projects under his management, documentation and materials on work projects to colleagues, as well as transfer of inventory items, if any*". This echoes clause 4.2(16), which provides that in the case of any termination, whatever the reason, the claimant must transfer to the defendant documents, files, passwords and equipment, at least 3 working days prior to the date of termination. In the event, the claimant did not discuss termination further with the defendant following that letter.

36. In the circumstances, I am unable to conclude that the claimant was required to work in any particular office or that he violated any requirement to do so. Equally, the claimant seems content for the defendant not to have provided a physical place of work. The parties appear to have proceeded from the outset of the contract on the basis that the claimant would work from home and did so. Neither party has established any actionable breach of contract in relation to these workplace issues.

Issue 4: Termination

37. The claimant seeks an order requiring the defendant to terminate the agreement.

38. The duration of the contract is addressed in clause 2:

> *"2.1 The Agreement is concluded for 1 year.*
>
> *2.2 The date of commencement of work: June 12, 2020.*
>
> *2.3 Upon expiry of the Agreement, the Parties shall be entitled to extend it for an indefinite or fixed term of at least one year. In case of expiration of the term of the labor agreement, if neither party has notified in writing about the termination of the employment relations during the last working day (shift), the Agreement is considered to be extended for the same period as it was previously concluded, except for the cases provided by the AIFC Regulations, the Code of Ethics."*

39. As neither party sent a notification of termination before the end of the first year, on 12 June 2021 the agreement was automatically extended for a further year.

40. The contract might terminate before that period expires if either party chooses to terminate following a material breach by the other. That has not happened.

41. The first mention of termination was in the claimant's short letter of 23 July 2021, which said "*I ask you to terminate the employment contract with me on my initiative on July 23, 2021, the last working day is July 23, 2021*". It is not entirely clear on what basis the claimant sought to terminate. Clause 10.4 provides:

> *"In the event of termination of this Agreement on its own initiative, the Employee shall be obliged to notify the Employer in writing not later than 1 (one) calendar month in advance, and during this period, the Employee shall:*
> - *reimburse losses, if they were caused to the Employer by the Employee,*
> - *pay all kinds of debts to the Employer,*
> - *finish the work started".*

42. However, the claimant did not give a month's notice; nor is there any suggestion of doing any of the things listed in the clause.

43. Alternatively, the parties can agree earlier termination. This appears to be what the claimant was contemplating: his letter of 23 July asked the defendant to terminate, and his letter of 4 October asked the defendant again to consider the claimant's application. Termination by agreement is addressed in clause 10.5, which provides that one party may send a notice to the other, who should respond within three working days. Although the defendant did not respond to the claimant's first request, it could have simply declined. The defendant did eventually respond on 12 October, asking the claimant to meet to discuss possible termination. The claimant did not do so, but proceeded to commence this litigation. No agreement to terminate the contract was reached.

44. Accordingly, the employment contract remains in force. Under a contract of employment the parties have mutual obligations to be ready, willing and able to work, and to be ready, willing and able to pay wages. As noted in the context of Issue 2 above, the non-performance of one obligation excuses performance of the other. However, that does not mean that the contract ceases to exist if either is not performed. It simply means that the particular obligation is suspended until the other mutual obligation is performed.

45. I note that an agreed termination does not appear to be beyond contemplation. The defendant's position seems to be that it simply wants to ensure that termination of the contract happens legally and properly, with a complete transfer of projects, documents and materials. Both parties have expressed willingness to terminate the contract; it is to be hoped that they can resolve this between themselves.

Issue 5: Damages

46. As I have found that the defendant was not in breach of contract or obliged to pay the salary, the claimant has no entitlement to recover any damages.

47. It might be noted that, if the defendant had granted paternity leave, then the claimant would in any event have done no work, and earned no money, for the period between April and December 2021. He has suffered no loss of income and would have incurred the same expenditure either way. The claimant's substantial claim is somewhat surprising in circumstances where what he sought, and in fact achieved, was neither to work nor be paid during the remainder of the year.

48. Insofar as the claimant's further submissions make reference to his salary in the months prior to April 2021, this forms no part of the claim filed in this action and there is in any event insufficient evidence of any issue with the payments. The claimant's suggestion that his 200,000 tenge salary was unfairly imposed is difficult to reconcile with the lack of evidence of any complaint by the claimant, the fact that he signed the Additional Agreement No 1,[3] and the fact that he did not terminate the contract before it renewed in June 2021 – despite his submission in this case that he could have found another job with a salary of 1,500,000 tenge; that is some 7.5 times the amount of the salary agreed in November 2020.

Conclusion

49. For the reasons above, the claim falls to be dismissed in full. The defendant is not obliged to terminate the contract of employment nor to pay any damages to the claimant. Pursuant to Rule 26.9, I do not consider it appropriate to make any order as to costs.

By the AIFC Small Claims Court,

Patricia Edwards,
Justice, AIFC Small Claims Court

[3] The claimant refers to Article 46 of the Labor Code of Kazakhstan to say that the defendant should have given 15 days' notice of the change in salary. That provision deals with changes in working conditions and makes no mention of pay. In any event, as noted in the context of Issue 1 above, the Acting Law of the Republic of Kazakhstan applies in part to matters not governed by AIFC Acts. The AIFC Contract Regulations provide in Regulation 10 that a contract "*can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Regulations*". Clauses 10.1 and 12.2 of the contract provide for amendments to be made by a written additional agreement, as happened in this case.

Representation:

The Claimant was not represented

The Defendant was represented by:

1. Mr. Daniel Muzapbar, Korkem Telecom LLP;
2. Mr. Askar Issayev, Korkem Telecom LLP.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

CASE No: AIFC-C/CFI/2021/0008

Representation:
For Success K LLP: Mr. Erbolat Khasanov (Responsa Law Firm)
For the Ministry of Healthcare of the Republic of Kazakhstan: Ms. Bibigul Malgazhdarova (Ministry of Healthcare of the Republic of Kazakhstan)

Date of Judgment: 24 January 2022

IN THE MATTER OF AN APPLICATION FOR RECOGNITION AND ENFORCEMENT OF AN AWARD DATED 4 OCTOBER 2021 MADE IN IAC ARBITRATION No 2/2021 under the IAC Arbitration and Mediation Rules 2018
BETWEEN:

Success K Limited Liability Partnership — **Claimant**

v

Ministry of Healthcare of the Republic of Kazakhstan

Defendant

AND IN THE MATTER OF AN APPLICATION TO SET ASIDE AND TO REFUSE RECOGNITION AND EXFORCEMENT OF THE SAID AWARD
BETWEEN:

Ministry of Healthcare of the Republic of Kazakhstan

Claimant

v

Success K Limited Liability Partnership

Defendant

JUDGMENT

Chief Justice of the Court:

The Rt. Hon. The Lord Mance

Introduction

1. There are before the Astana International Financial Centre Court ("the AIFC Court") two Applications relating to a Final Award dated 4 October 2021 made in Arbitration No 2/2021 in the International Arbitration Centre ("IAC") of the AIFC. By this Award, the arbitration tribunal awarded the claimant in the arbitration, Success K LLP ("Success"), 74,031,989.00 tenge as due by way of debt from the State Authority, the Ministry of Health of the Republic of Kazakhstan ("the Ministry"), together with 1,207,090.98 tenge by way of contractual penalty for delay in payment of that debt. The debt and penalty were claimed under Contract No. SHIP-3/CS-06 dated 31 July 2019 ("the Contract") made between the parties for the provision by Success to the Ministry of Consultant's (or Consultancy) Services. The Contract contains the arbitration agreement pursuant to which Arbitration No 2/2201 took place.

2. The two Applications now before the AIFC Court are an Application by Success seeking recognition and execution of the Final Award and an Application by the Ministry seeking to have the Final Award cancelled or set aside and refusal of its recognition and enforcement on the ground that the arbitration agreement was and is invalid under the law of the Republic of Kazakhstan. The two Applications are in substance mirror images of each other. This judgment addresses them together.

Procedural history

3. At a case management conference on 12 November 2021 at which representatives of the two parties were heard remotely, both parties' representatives confirmed to the Court that, since they were themselves lawyers and expert in the law of the Republic of Kazakhstan, the parties were content for all questions arising regarding the law of the Republic of Kazakhstan to be addressed by submissions made to the AIFC Court.

4. Following the case management conference, the AIFC Court issued a Directions Order dated 15 November 2021, by which, inter alia:

    a. Success's Application was stayed until resolution of the Ministry's Application for an order setting aside and refusing recognition and enforcement of the said Award or until further order.
    b. Directions were given for the sequential exchange of written submissions

(accompanied by any relevant witness statements and supporting documentation) in relation to the Ministry's Application.

c. A date for an oral hearing of the Ministry's Application was to be fixed through the Registrar.
d. Each party was given liberty to apply for any variation of the Directions Order or timetable or any further order or direction.

5. Pursuant to the Directions Order, the Ministry filed written submissions on 26 November 2021, Success filed written submissions by way of Objection on 8 December 2021 and the Ministry filed written submissions in reply on 15 December 2021. Also on 15 December 2021, both parties wrote to the Court expressing a wish to expedite the conclusion of the case to 23 December 2021, dispensing with any oral hearing.

6. The Court having considered the written submissions and the parties' wish, responded by the Registrar's email dated 23 December 2021 to the effect that:

a. The Court believed that it should be possible to proceed to a speedy judgment without an oral hearing, with the parties' consent, but that this would not be possible until after 23 December 2021.
b. In order to decide the issues on both parties' Applications, the Court asked both parties to inform the Court (in writing through letter within 7 days) and to produce a copy of any decision(s) of the Courts of Kazakhstan on two points, to which the Court will return below (see paragraphs 31 and 32 below).
c. Assuming that, after seeing the responses to point 2, the Court still considered it appropriate to proceed to judgment without an oral hearing, it would propose in the judgment to deal with both the Ministry's Application to set aside and resist recognition and enforcement of the Award and Success's Application for recognition and enforcement (removing the stay of that Application for this purpose). On the information before the Court, the two Applications were mirror images of each other, so that, if the one party succeeded on one, the other party must fail on the other, and vice versa.
d. The parties were invited to reconfirm, when responding to point 3, that they were content for the matter to proceed as set out in this way. Assuming that no point arose appearing to need further attention, the judgment should then be expected in the first half of January 2022.

7. In response to the Registrar's email, the Ministry by email on 30 December 2021 informed the Court that there was, according to the State Property and Privatization Committee, no court decision of the kind requested by the Registrar's email. It added that the only available document was a judgment of the Judicial Collegium for Civil Cases of Nur-Sultan City Court in the case *Apex Consult LLP v. The Ministry of Health* (Case No. 2a-7236-21 dated 6 October 2021), to which the Court will return below. The Ministry's

email also confirmed the Court's proposal for a possible judgment without an oral hearing.

8. Success responded to the Registrar's email by email on 10 January 2021, saying inter alia:

> "1. As a result of the search for court practice on the AIFC arbitration clause, we came to the conclusion that to date there was no court practice. …….
> 2. On the issue of the Court decision of APEX CONSULT LLP, we inform you that they had a clause not related to the court of the IAC AIFC.
> 3. We reiterate that we agree to consider the case without calling the parties."

9. Both parties were therefore agreed that the Court should proceed as indicated in the Registrar's email. This judgment will accordingly address both Applications without any further oral hearing and with the stay on Success's Application being lifted to enable this.

The AIFC Arbitration Regulations

10. The AIFC Arbitration Regulations dated 5 December 2017 ("The AIFC Arbitration Regulations") provide so far as presently material as follows:

> "PART 3: RECOGNITION AND ENFORCEMENT OF AWARDS
>
> **45. Recognition and enforcement of awards**
>
> (1) An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding with the AIFC and, upon application in writing to the AIFC, shall be enforced within the AIFC, subject to the provisions of this Article and of Articles 46 and 47.
>
> …..
>
> **47. Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the AIFC Court only
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the AIFC Court proof that:
>
> (i) ….. the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication, under the law of the State or jurisdiction where the award was made; …."

The Contract and arbitration agreement

11. The Contract for Consultant's Services is, by virtue of its General Conditions 1.1(b) and 3.1 and the Special Condition relating thereto, expressly governed by and to be construed in accordance with the law of Kazakhstan. The conditions just mentioned read as follows:

    a. *General Condition 1.1(b):*

    "'Applicable law' means the laws and any other instruments having the force of law in the Client's country or in such other country as may be specified in the **Special Conditions of Contract** ….."

    b. General Condition 3.1:

    "This Contract, its meaning and interpretation, and the relation between the Parties shall be governed by the Applicable Law."

    c. Special Condition relating to General Conditions 1.1(b) and 3.1:

    "This Contract shall be construed in accordance with the law of the Republic of Kazakhstan."

12. General Conditions 1.1(b) and 3.1 and the Special Condition relating thereto all address the applicable substantive law of the Contract. The position as regards dispute resolution is a separate matter which requires separate consideration. The applicable law governing an arbitration ("the arbitral law") may be, and not infrequently is, different from that governing substantive issues arising under the contract in which the arbitration agreement appears. That is expressly recognized in Article 7.2 of the Rules of Arbitration and Mediation at the IAC ("the IAC Rules"), set out in paragraph 34 below, as well as being a general international arbitral principle.

13. The present Contract addresses dispute resolution in Clause 49 and Special Condition 49. In a translation of the Contract put before the Court by both parties, these provisions read:

    a. Clause 49:

    "49. Dispute Resolution
    Any dispute between the Parties arising under or related to this Contract that cannot be settled amicably may be referred to by either Party to the

adjudication/arbitration in accordance with the provisions specified in the SCC."

b. Special Conditions of Contract:

"49. Disputes shall be settled by arbitration in accordance with the following provisions:
Any dispute, controversy, difference or requirement, whether contractual or non-contractual, arising from or in connection with this contract, including regarding the existence, validity, interpretation, performance, breach or termination of this contract is transferred [to be] finally resolved by arbitration administered by the [IAC] in accordance with the rules of arbitration and media [sic] and the IAC [sic] which are included in this disclaimer [sic].

1 Number of arbitrators
The number of arbitrators must be three …..

2. Place of arbitration and applicable law
The place of arbitration in the Republic of Kazakhstan. Applicable law is the law of arbitration.

3. Language of arbitration
The language of arbitration is Russian."

14. Something has evidently gone wrong in the translation of the first main paragraph. The word "media" should obviously read "mediation". But the next words "and the IAC" do not make sense in their context, and the final word "disclaimer" must be an incorrect translation. Versions of Special Condition 49 in the translations of Success's original Application and of the Final Award, which are also before the Court, assist to understand the text. The translation in the Final Award refers to disputes being resolved by

"arbitration administered by the IAC in accordance with the IAC Arbitration and Mediation Rules in force on the date on which the Request for arbitration is filed with the Registrar of the IAC, which Rules are deemed to be incorporated into this clause".

Paragraph 2 is also translated in the Final Award as follows:

"The seat of the arbitration will be the Republic of Kazakhstan. The law governing the arbitration proceedings shall be the law of the seat".

The matching statement in the Ministry's original Application to set aside is translated as follows:

> "The place of arbitration is determined as the Republic of Kazakhstan and the applicable law is the law of the arbitrage place".

Analysis of the Ministry's primary case

15. The Ministry's case is that this arbitration provision is invalid because it was concluded in violation of the law of Kazakhstan without obtaining the consent of the state body responsible for state property, namely the State Property and Privatization Committee of the Ministry of Finance of the Republic of Kazakhstan (the "CSPP"). At a late stage during the arbitration proceedings, the Ministry made to the arbitration tribunal a submission dated 21 September 2021, raising the question whether the arbitration agreement was valid and referring in this context to Article 8(10) of the Arbitration Law of the Republic of Kazakhstan. At that stage, this could only have been a question about or an objection to jurisdiction. At the present stage, its relevance is, under Article 47(1)(a)(i) of the AIFC Arbitration Regulations (see paragraph 10 above), as a potential reason for refusal of recognition and enforcement, on the ground that

> "the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication, under the law of the State or jurisdiction where the award was made".

The application of Article 47(1)(a)(i) depends, however, expressly on the application of the Arbitration Law of the Republic of Kazakhstan to the arbitration agreement, either as the law to which the parties subjected their arbitration agreement or (in the absence of any indication) as the law of the State or jurisdiction where the award was made.

16. Article 8(10) of the Arbitration Law of Kazakhstan, on which the Ministry relied before the arbitration tribunal, expressly precludes state bodies from engaging in arbitration without the CSPP's consent and Article 9(4) requires such consent to be recorded in the arbitration agreement. It is not suggested that any such consent was in the present case obtained by the Ministry or recorded. It also appears to be common ground that, if such consent was required in this case, the effect of failure to obtain it would, under the Civil Code of Kazakhstan, be to invalidate the arbitration agreement

contained in the Contract. The Ministry relies in this connection on the judgment of the Judicial Collegium for Civil Cases of the Court of Nur-Sultan in *Apex Consult LLP v. The Ministry* (already mentioned in paragraphs 7 and 8 above).

17. In *Apex Consult LLP v. The Ministry*, the Judicial Collegium was concerned with a consultancy contract between Apex Consult LLP and the Ministry, but there is the important difference from the present case that, according to the judgment, the agreement to arbitrate any dispute that could not be settled amicably was, in *Apex Consult LLP v The Ministry*, for such arbitration to take place

> "in the Russian Federation, unless the parties have agreed otherwise".

A dispute having arisen which was not settled amicably, the claimant, Apex Consult LLP, requested the Ministry "to consider the possibility of amending the contract to consider controversial issues by the Specialized Interdistrict Economic Court of the city of Nur-Sultan" or, if this was not possible, "to consider the possibility of resolving the dispute in the [IAC] at the AIFC or in the Atameken Arbitration Center in the city of Nur-Sultan". There was therefore no contractual agreement to submit to IAC arbitration, merely a wish or request by Apex Consult LLP to vary the contract to provide for this or some form of arbitration other than that actually provided by the contract. The Ministry on the other hand submitted that the arbitration agreement was invalid for failure to comply with Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, and that the contract had expired, the obligations under it had terminated and it was not possible to amend it.

18. The Judicial Collegium, applying the ordinary law of the Republic of Kazakhstan, accepted the submission that the arbitration agreement was invalid for failure to comply with Article 8(10) - though it went on to observe, first, that it was the Ministry's duty to comply with Article 8(10), and, second, that, in circumstances where, as a result of the Ministry's failure to comply with its duty, "the parties are deprived of the opportunity to implement the arbitration agreement, the court [of first instance] reasonably concluded that the stated claim was legitimate and should be satisfied". It appears from this last statement that the first instance court had, in the absence of a valid arbitration clause, decided the substantive claim itself in favour of

Apex Consult LLP, and that the Judicial Collegium upheld this decision. For present purposes, what matters is that the judgment in *Apex Consult LLP v The Minister* confirms the invalidity, under the ordinary civil law of the Republic of Kazakhstan, of an arbitration agreement which should, but does not, comply with Article 8(10) of the Arbitration Act of the Republic of Kazakhstan. But the judgment is and can only be only relevant if Article 8(10) of the Arbitration Act of the Republic of Kazakhstan applies to whatever arbitration agreement is under consideration (i.e. here the arbitration agreement in the Contract).

19. The arbitral tribunal on 28 September 2021 rejected the Ministry's submission that the present arbitration agreement was invalid. It rejected it on the ground that Article 8(10) did not apply to the present arbitration agreement. It referred, in support of this ground, to Regulation 7 of the AIFC Arbitration Regulations adopted by Resolution of the AIFC Management Council dated 5 December 2017 made under Article 14 of the Constitutional Statute of the Republic of Kazakhstan on the AIFC No. 438-V of 7 December 2015. Regulation 7 provides:

> "**Exemption from legislation**
> The requirements of the Arbitration Law of the Republic of Kazakhstan do not apply to arbitrations conducted under these Regulations."

20. In the light of Special Condition 49, set out in paragraphs 13-14 above, the present arbitration was an arbitration conducted under the AIFC Arbitration Regulations. Regulation 7 is, on the face of it and as the arbitral tribunal thought, the end of the matter. Regulation 7 is binding law in the AIFC. It provides, without qualification, that an arbitration conducted under the AIFC Arbitration Regulations is not subject to the requirements of the Arbitration Law of the Republic of Kazakhstan. That is a provision of the law of the AIFC to which the AIFC Court must give effect, just as the arbitration tribunal did in response to the Ministry's submission of 21 September 2021.

21. Both in its submission to the arbitration tribunal dated 21 September 2021 and in its present Application before the Court, the Ministry has, however, relied on other provisions, particularly Article 18 of the IAC Arbitration and Mediation Rules 2018 and paragraph 2 of Article 49 of the Contract, as supporting its position.

22. Article 18 provides as follows:

> "Article 18 Applicable Law
> 18.1 The Tribunal shall decide the merits of the dispute on the basis of the law in the arbitration agreement. In the absence of such agreement, the Tribunal shall apply the law that it considers most appropriate with regard to the circumstances of the case and the overriding objective.
> 18.2 Any designation by the parties of the law of a given state shall be deemed to refer to the substantive law of that state, not to its conflict of laws rules. "

23. The Ministry relies on Article 18, so the Court understands, as indicating what law applies to determine whether the arbitration agreement was valid, and on paragraph 2 of Special Condition 49 as indicating that the relevant law is the law (and in particular the Arbitration Law) of the Republic of Kazakhstan. The Court does not, however, accept that Article 18 has any relevance to the question whether the Arbitration Law of the Republic of Kazakhstan applies to the present arbitration. That is a question to be decided by the law governing the arbitration, the arbitral law. Article 18 is not addressing the arbitral law. It is addressing the law governing the merits of the substantive dispute, that is here the law governing the dispute about the unpaid debt and penalty which was referred to and decided by the IAC arbitration tribunal. Although Article 18.1 speaks of the merits of the dispute being decided "on the basis of the law in the arbitration agreement", this must mean the law governing the Contract identified by the provisions set out in paragraph 11 above. Article 18 is irrelevant to the issue regarding the arbitral law, which is before the Court.

24. Paragraph 2 of Special Condition 49 of the Contract is, in contrast, concerned with the applicable arbitral law. That is so, whichever translation set out in paragraphs 13-14 above is used. Regulation 30(1) of the AIFC Arbitration Regulations expressly provides that "The parties are free to agree on the seat of the arbitration". Paragraph 2 contains the parties' agreement on the place or seat of arbitration and on the law which is to govern the arbitral proceedings (the "arbitral law").

25. The Court understands the Ministry's case to be that paragraph 2 constitutes a choice by the parties of the law, and in particular the Arbitration Law, of the Republic of Kazakhstan as the applicable arbitral law. The Court does not accept that submission.

Paragraph 2 must be read with the first main paragraph of Special Condition 49, which provides that the parties are submitting to IAC arbitration under the IAC Rules. The IAC is part of the AIFC, which is itself both an area and a jurisdiction within the Republic of Kazakhstan. Under Article 1 of the Constitutional Statute NO 438-V ZRK of 7 December 2017, the AIFC

> "means the area within the City of [Nur-Sultan] determined by the President of the Republic of Kazakhstan as the area where the special legal regime in the financial sphere established by this Constitutional Stature applies."

Under Article 9 of the Constitutional Statute, the Court and IAC are AIFC Bodies and

> "are independent in their exercise of the powers given them by this Constitutional Statute and AIFC Acts".

Under Article 4, the law of the AIFC consists of the Constitutional Statute and AIFC Acts (of which the AIFC Arbitration Regulations are one) not inconsistent with it, while the law of the Republic of Kazakhstan only

> "applies in part to matters not governed by this Constitutional Stature and AIFC Acts".

26. Reading Special Condition 49 as a whole, what the parties were agreeing was to resolve any disputes by IAC arbitration within the jurisdiction of the AIFC which is within the Republic of Kazakhstan and to do this subject to the arbitral law of the IAC which is found in the AIFC Arbitration Regulations and the IAC Rules. It makes no real sense to suppose that, by paragraph 2, the parties intended to select a seat outside the area and jurisdiction of the AIFC or an arbitral law different from or in addition to that of the AIFC and IAC, for which they elected in the first, main part of Special Condition 49. The arbitral law is therefore for all purposes that of the AIFC and IAC. It is not in any respect the general arbitral law, or the Arbitration Law, of the Republic of Kazakhstan.

27. The AIFC Arbitration Regulations therefore apply, and Regulation 7 positively provides or confirms that the requirements of the Arbitration Law of the Republic of Kazakhstan have no application to the present IAC arbitration. It also follows that, in

the terms of Article 47(1)(a)(i) of the Arbitration Regulations, the arbitration agreement was valid under the law to which the parties submitted it, that is the law of the AIFC (and, for good measure, that it was also valid under the law of the jurisdiction, again the law of the AIFC, where the Final Award was made).

28. In conclusion, the arbitration tribunal was correct, for the reasons it gave, to dismiss the Ministry's question regarding the validity of the arbitration agreement as put in the submission dated 21 September 2021. In so far as the Ministry now submits before the Court that the arbitration agreement is invalid by virtue of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, the Court holds, for the reasons given, that Article 8(10) has no application and rejects the Ministry's submission.

The Ministry's alternative case

29. In the Ministry's Application before the AIFC Court, the Court understands the Ministry to advance an alternative or additional case to that made in its written submission of 21 September 2021. The Ministry's submissions before the Court start once again with paragraph 2 of Special Condition 49 and Article 18 of the AIFC Arbitration Rules 2018, to which the observations already made above continue to apply. But the Ministry does not in its Application focus at all on Article 8(10) of the Arbitration Law of the Republic of Kazakhstan. Instead, the Ministry submits, as the Court understands it, that the Law on State Property applies *directly* to invalidate the arbitration agreement. The way the Ministry puts this in its Application is as follows:

    a. First, the Ministry operates with "funds allocated from the budget of the Republic of Kazakhstan".
    b. Second, "the [C]ontract was concluded in a large amount of funds, …, 780,303,932 tenge …".
    c. Third, "Therefore, the Ministry of Health …. had to agree on the conclusion of conclusion of an arbitration agreement with the authorized body for state property management (CSPP) ….".

    If this alternative case has any force, its logic is, self-evidently, that the whole Contract, rather than the arbitration agreement, is invalid as being contrary to the Law on State Property.

30. Success in its Objection in answer to the Ministry's case before the Court stated (in translation) that:

> "Although the Respondent refers to the Law of the Republic of Kazakhstan "On State Property", however the parties did not violate it, since there is no obligation on the state body to obtain permission to conclude agreements (contracts)."

The Ministry in its Reply dated 15 December 2021 merely reiterated its position that consent of the authorized body was mandatory under the Law on State Property.

31. In view of the alternative way in which the Ministry's case now appeared to be being advanced, the Court issued the second direction contained in the Directions Order referred to in paragraph 4 above. The two questions in relation to which the Court invited the parties to identify and produce copies of any relevant decisions of the Courts of Kazakhstan were identified as follows:

    a. Any decision of the Courts of Kazakhstan on the question whether the Law on State Property does or does not apply to, and require authorization by the appropriate state body (here the CSPP) of, an ordinary commercial contract (such as the consultancy Contract in issue in this case) made by a state body using state funds for its performance.
    b. Any decision of the Courts of Kazakhstan on the question whether, apart from and without the enactment of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, the Law on State Property does or does not have any direct application to an arbitration agreement contained in a contract made by a state body using state funds for its performance.

32. As indicated in paragraphs 7 and 8 above, the Ministry by its response dated 30 December 2021 and Success by its response dated 10 January 2022 both informed that Court that no decision had been found on either of the two questions which the Court had raised. In addition to the text set out in paragraph 8 above, Success, in paragraph 1 of its email response, simply reiterated that the Law on State Property contains "no direct rule" restricting the rights of state bodies under an arbitration clause. In none of its submissions to the Court, has the Ministry identified any provision in the Law on State Property which does stipulate that authorization is required for contracts rather than property transactions.

33. The Law on State Property is, no doubt, part of the general substantive law of the Republic of Kazakhstan, and the Court is content to proceed on the basis that, under the provisions of the Contract set out in paragraph 11 above, that law governs any substantive issues arising under the Contract. But, on examination, The Law on State Property appears to the Court to be concerned with the use, disposition and management of State Property, including funds, and not with contracts. Article 14(11) of the Law provides for an authorized body on state property to give consent to a state enterprise for alienation or other disposal of its state property (other than by way of sale of manufactured goods), and for establishment of branches and representative offices as well as for the transfer and write-off of debtor indebtedness. There is nothing in the Law to which the Court's attention has been drawn or which the Court can identify, to cover contracts generally or this particular Contract. The regulation of contracts involving the use of state funds would, if envisaged, have been expected to require specific provisions. Nothing of this sort appears to exist or has been shown. The Court would not therefore be minded to accept, on the basis of the materials and submissions before it, that the Law on State Property applies to the making of the Contract.

34. But it is not necessary to go that far or to base the Court's present decision on the Applications before it on the conclusion that the Law on State Property does not apply to contracts or to this Contract. That is not the critical question. The critical question is whether the Law on State Property applies to or has anything to do with arbitration agreements or the present arbitration agreement. Even if a contract containing provisions involving the expenditure of state funds is itself invalid, an arbitration agreement within it is a dispute resolution mechanism which does not as such contain any such provisions (although it may of course give rise to an award which does), and which, in any event, operates an independent and severable provision subject to its own arbitral law. Such an arbitration agreement is well capable of remaining valid, even if the contract containing is held invalid. Article 7 of the IAC Arbitration Rules covers this situation very clearly, stating:

> "7.2 An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement, and the Tribunal shall not cease to have jurisdiction

by reason of any allegation that the contract is non-existent or null and void".

35. Furthermore, a conclusion that the Law on State Property has no application to arbitration agreements which are included in contracts which happen to involve the expenditure of state funds is, in the Court's view, strongly supported by the enactment and existence of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan itself. Article 8(10) was and is only necessary at all on the basis that either contracts generally *or at very least arbitration agreements* in contracts were and are outside the scope of the Law on State Property.

36. Finally, if arbitration agreements under the AIFC Arbitration Regulations were and are within the direct scope of the Law on State Property independently of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, that would circumvent and undermine Regulation 7 of the AIFC Arbitration Regulations, in a way which cannot have been envisaged. An obvious purpose of Regulation 7 was to clarify that there was no need to seek the consent of the state body responsible for state property, so precluding possible arguments that Article 8(10) might otherwise have required such consent. Yet the Ministry's alternative case would, if correct, mean that the Law on State Property applied directly to require the same consent, thereby rendering Regulation 7 ineffective for that purpose.

37. Even without the point made in paragraph 36, the Court considers that there is, for the reasons given in paragraphs 33 to 35, no merit in a submission that the Law on State Property has, independently of Article 8(10) of the Arbitration Law of the Republic of Kazakhstan, the direct effect of invalidating an arbitration agreement under the AIFC Regulations such as that found in the Contract. Paragraph 36 underlines that conclusion.

38. This is sufficient to determine that the Ministry's Application, which seeks cancellation or setting aside of the Final Award and refusal of its recognition and enforcement, fails; and also that no reason has been shown for refusing to recognize and enforce the Award made in Success's favour.

Supplementary observation

39. The Court would add one supplementary observation, for completeness only, on the

Ministry's alternative case. The logic of the Ministry's alternative case is, as stated in paragraph 29 above, that the Contract, rather than the arbitration agreement, is invalid. That is a case which the Ministry could and should have raised before the arbitration tribunal. For the reasons already given, it is not a case which could, in the Court's view, affect the validity of the IAC arbitration agreement in the Contract or the jurisdiction of the arbitration tribunal. The IAC arbitration agreement operates independently of the rest of the Contract, and the arbitration tribunal was the forum with jurisdiction to determine the validity of the Contract. No challenge was made before the arbitration tribunal to the validity of the Contract, and, having regard to the limited grounds on which recognition and enforcement can be refused under the AIFC Arbitration Regulations (see paragraph 10 above), none can be or is raised now.

Conclusion on the Ministry's further or alternative case

40. In summary, the Court concludes, there is nothing in the Ministry's alternative case to affect the validity of the arbitration agreement or therefore to affect the tribunal's jurisdiction or the validity of its Final Award, and the Ministry's Application also fails in so far as it is put in this way.

Order

41. It follows from the above that:

    a. The Ministry of Health's Application for setting aside and refusal of recognition or execution of the Award fails and is dismissed.

    b. No other basis being suggested for refusing the recognition and execution which Success seeks, Success K LLP's Application for recognition and execution of the Award dated 4 October 2021 made against the Ministry of Health in IAC Arbitration No 2/2021 is granted.

    c. Subject to any special circumstances to which either party may wish to draw the Court's attention, within the next 7 working days, the Ministry of Health shall pay Success K LLPs' costs of its own and Success K LLP's Applications, to be assessed by the Court unless agreed.

By Order of the Court,

The Rt. Hon. The Lord Mance,
The Chief Justice of the AIFC Court

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

7 December 2022

CASE No: AIFC-C/CFI/2022/0023

FIRM 800 LIMITED LIABILITY COMPANY

Claimant

and

MINISTRY OF HEALTHCARE OF THE REPUBLIC OF KAZAKHSTAN

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 10 November 2022 the Claimant seeks an Order from this Court to enforce the measures set forth in Section "G" "Resolutive part of the Arbitration Award", dated 4 November 2022, made by Dr. Askar Kaldybayev, the sole arbitrator appointed by a letter dated 11 March 2022 of Ms. Barbara Dohmann KC, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No. 12/2022.

2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

   That the Ministry of Healthcare of the Republic of Kazakhstan pay to Firm 800 Limited Liability Company:

   (1) debt in the amount of USD 27,747.14 (twenty-seven thousand seven hundred and forty-seven dollars and fourteen US cents);

   (2) the costs of the Arbitrator's fees in the amount of USD 1,000 (one thousand dollars);

   (3) the legal costs in the amount of USD 1,800 (one thousand eight hundred dollars).

   By no later than 6pm Astana time on Friday 6 January 2023, being 30 days from the date of this Judgment and Order.

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

By the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Ravil Kassilgov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was not represented.

AMENDMENT DATED 7 MARCH 2023

4. The payment amounts expressed in USD in paragraph 2 of this Judgment are shown here in KZT at the rate of 463,6 KZT per USD 1 at the date of this Judgment:

   (1) debt in the amount of USD 27,747.14 (twenty-seven thousand seven hundred and forty-seven dollars and fourteen US cents) (12,863,574 KZT);

   (2) the costs of the Arbitrator's fees in the amount of USD 1,000 (one thousand dollars) (463,600 KZT);

   (3) the legal costs in the amount of USD 1,800 (one thousand eight hundred dollars) (834,480 KZT).

By the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

CASE No: AIFC-C/CFI/2022/0012

AND IN THE MATTER OF AN APPLICATION TO SET ASIDE AN AWARD DATED 18 FEBRUARY 2022 MADE IN IAC ARBITRATION No 81/2021 under the IAC Arbitration and Mediation Rules 2018

BETWEEN:

AKSAYSTROY-2020 LLP

Claimant

v

METALLINVESTATYRAU LLP

Defendant

JUDGMENT
Dated 29 July 2022

Chief Justice of the Court:

The Rt. Hon. The Lord Mance

Introduction

1. There is before the Astana International Financial Centre Court ("the AIFC Court") an application by Aksaystroy-2020 LLP ("Aksaystroy") to set aside a final award dated 18 February 2022 made in Arbitration No 81/2021 in the International Arbitration Centre ("IAC") of the AIFC by Arbitrator Indira Yeleusizova. By her Award, the arbitrator awarded the claimant in the arbitration, MetallInvest LLP ("MetallInvest"), 17,807,787 tenge as the price of metal purchased by the respondent in the arbitration, Aksaystroy, together with 3,739,635 tenge by way of interest and 580,948 tenge by way of expenses. The application is made under Article 44(2)(a)(iii) of the AIFC Arbitration Regulations 2017 on the ground, in summary, that the arbitrator exceeded her jurisdiction. The application was listed for hearing and was heard before me at an in person hearing in the AIFC Court in Nur-Sultan on 13th June 2022.

2. MetallInvest's claim to the said price was made in respect of three consignments or batches of metal allegedly delivered under a Delivery Agreement No AKTYU-288 dated 6 August 2021, amended and supplemented by an Additional Agreement dated 28 August 2021 and an Appendix containing Specification No 3 also dated 28 August 2021 (replacing two previous Specifications). All three of these contractual documents give as the Parties' legal addresses: in the case of Aksaystroy, an address in Atkobe; and, in the case of MetallInvest, an address in Atyrau. But they all also go on to specify as the address for transfer of the goods a MetallInvest warehouse at 105 Pozharsky Street, Aktobe.

3. Clause 9.1 of the Delivery Agreement provides for all disputes or disagreements arising between the Parties under the Agreement or in connection with it to be "resolved in the International Arbitration for the West Kazakhstan held at the site of the International Arbitration Centre of the Astana International Financial Center Nur-Sultan …. (hereinafter referred to as the IAC AIFC), in accordance with the Rules of Arbitration and Mediation of the IAC AIFC" by "one presiding arbitrator Indira Yeleusizova", and the Parties in clause 9.2 confirmed that "they have read and agree with the Arbitration Rules of West Kazakhstan and the IAC AIFC". On this basis MetallInvest commenced Arbitration No 81/2021 claiming the price of the three batches of metal as due, together with interest and expenses.

4. During the Arbitration, no challenge was made to the arbitrator's jurisdiction or the way in which she was exercising it. The present application is, however, made on the basis that, in the award which she issued at the conclusion of the arbitration, she, in some way, exceeded her jurisdiction. Aksaystroy's application form specifically relies in this connection on and quotes Article 44(2)(a)(iii) of the AIFC Arbitration Regulations 2017. Under Article 44(2)(a)(iii):

> "An arbitral award may be set aside by the AIFC Court only if:
> (a) The party making the application furnishes proof that:
> ……
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; ….."

It is not suggested that any other of the grounds in Article 44 on which an application may be made to set aside an IAC award has any relevance in this case.

The circumstances and Award in greater detail

5. The following matters are shown by the award and the application form and annexed documents, as well as various further documents produced by the parties after the oral hearing. It appears that Aksaystroy needed metal for construction of an apartment block in the city of Uralsk. MetallInvest's case, reflected in a letter No 228 dated 25 October 2021 to Aksaystroy, was and is that it delivered the relevant three batches of metal when they were shipped at and from its Aktobe warehouse to Aksaystroy's premises in the city of Uralsk in accordance with three goods issue slips, no 22420 dated 7 August 2021, no 28073 dated 28 August 2021 and no 28083 dated 28 August 2021. At the foot of each of the three goods issue slips, as translated, appear the words "Handed over the item Butko O.V.", followed by a note stating that the original slip caries a signature purporting to be by Mr Bikmukhambetov R.R. Mr Butko O.V. is identified as the Head of MetallInvest's

Aktobe warehouse in documents relating to the consignment of the goods produced after the hearing by MetallInvest. Mr Bikmukhambetov R.R. was treated in the arbitration as the registered recipient of a power of attorney issued by Aksaystroy, entitling him to sign accepting receipt of good on behalf of Aksaystroy. (The Ministry of Finance Register for the period ended 20 October 2021 produced with Aksaystroy's application evidences this only for the period 6 August 2021 to 18 August 2021, but nothing appears to have been made of this, presumably on the basis that his authority was or may well have been renewed and extended.) MetallInvest evidently relied in support of its claim in the arbitration on the goods issue slips, on a Reconciliation Act and Letter of Guarantee No 279 dated 27 July 2021 signed by Aksaystroy undertaking to pay the price by 12 February 2022, on electronic invoices submitted by MetallInvest dated 7 August 2021, on Specification No 3 dated 28 August 2021 signed by both Parties and on subsequent reminders to Aksaystroy about non-payment, which were not rejected by Aksaystroy. Subsequent to the oral hearing, it has also produced various further consignment documents which it says were also before the arbitrator.

6. In the above circumstances, MetallInvest initiated the present arbitration on 10 October 2021, claiming the price of the three batches. The award indicates clear that Aksaystroy sought to resist the claim before the arbitrator by reference to a number of points:

    a. The initiation of the arbitration proceedings was premature, in the light of the Letter of Guarantee undertaking to pay the price by February 2022.
    b. The consignments had been stolen by a group of persons.
    c. A criminal case had been initiated in the city of Uralsk, a "circle" of suspects had already been established, from whom initial statements had been taken, and the police were establishing the current location of the stolen goods.
    d. The authenticity of Mr Bikmukhambetov's purported signatures on behalf of Aksaystroy was in doubt.
    e. MetallInvest should be required to provide waybills covering the consignments, under paragraph 12 of the Order of the Minister for Investment and Development of the Republic of Kazakhstan dated 30 April 2015 No 546 "On Approval of the Rules for the Transportation of Goods".
    f. Aksaystroy signed the Reconciliation Act, Specification No 3 and Letter of Guarantee and acted thereafter in the belief that the goods would be or had been

delivered, and not by way of confirmation of delivery.

7. The award makes clear that the arbitrator did not consider the arbitration proceedings premature. She pointed out (in paragraph 17 of the Award) that clause 4.1 of the Delivery Agreement required Aksaystroy to pay MetallInvest 100% of the price no later than 30 days after signature by Aksaystroy or its authorized agent of the relevant Specification or invoice for the relevant consignment, if not otherwise provided by the parties in the Specification or additional agreement, and that under Specification No 3 dated 28 August 2021 the deadline for payment was set as no later than 10 September 2021.

8. As to the remaining points raised by Aksaystroy in its defence, the arbitrator was evidently satisfied on the material put before her that delivery had been effected by MetallInvest in the city of Aktobe, with shipment and acceptance of the goods taking place likewise in the city of Aktobe. The criminal proceedings had, on the other hand, been initiated in the city of Uralsk "on the basis of a report about a shortage of inventory for a large sum for the construction of multi-apartment buildings at Uralsk" (paragraph 34). In effect, any shortage or loss by abstraction had occurred subsequent to delivery to Aksaystroy at MetallInvest's Aktobe warehouse, and any criminal investigation into it was, on that basis, irrelevant. Delivery having been made, she accordingly held the price to be payable.

The issues before the AIFC Court

9. Before the AIFC Court three issues were raised:
    a. Whether the legal representatives of Aksaystroy were properly authorized to appear and to represent Aksaystroy at the hearing before me on 13th June 2022.
    b. Whether the application to set aside was issued within the three month period referred to in Article 44(3) of the AIFC Arbitration Regulations 2017.
    c. Whether the application to set aside was made good as a matter of substance.

The first two points are new points which are, by their nature, independent of the third.

10. MetallInvest, in raising point a) before the AIFC Court, relies on Aksaystroy's failure to produce a certificate attesting to the authority of those purporting to represent it before the AIFC Court. Asked by the Court what basis there was for suggesting that such a

certificate is necessary before the AIFC Court, MetallInvest's response was that a certificate is required under the legislation of Kazakhstan, and that this is applicable under clause 12.5 of the Delivery Agreement, as recorded by the arbitrator in paragraph 24 of her Award. Clause 12.5 provides:

> "The terms, other rights, obligations and responsibilities of the Parties that are not reflected in this Agreement are regulated in accordance with the requirements of the current legislation of the Republic of Kazakhstan."

11. Clause 12.5 addresses the law governing substantive issues arising under the Delivery Agreement. Whether a certificate is required for appearance before the AIFC Court is not such a substantive issue. It is, like other procedural issues relating to any dispute, an issue subject to the law governing the dispute resolution provisions contained in Clause 9.1 and 9.2. Article 7.2 of the IAC Arbitration Rules states: "An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract". An arbitration agreement is therefore treated as independent of, and will not infrequently be subject to a different law to that governing substantive issues arising under, the main contract. That is so here, where the Agreement provides for arbitration under the Arbitration Rules of the IAC AIFC. The intended effect is clearly that the arbitral law of the AIFC shall apply. There is under AIFC Court law no requirement for any such certificate as suggested by MetallInvest. All that is required of any lawyer appearing for a client before the AIFC Court is that she or he be (i) licensed by the AIFC Court to so appear and (ii) authorized to so appear by their client. The existence of authority is here not challenged, and would normally be presumed from the fact of appearance. It would be a serious breach of professional duty for a lawyer to appear to represent a client, without having authority to do so. It follows in the present case that point (a) raised by MetallInvest fails, and must be dismissed.

12. Point (b), again raised by MetallInvest, is that Aksaystroy's application to set aside is out of time under Article 44(3), which reads:

> "An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or such longer period as the parties to the arbitration have agreed in writing ……"

There is no suggestion here of any longer period than three months being agreed between the parties. MetallInvest raised point b) on the basis that the relevant start date was 23 December 2021. That is however merely the date on which Justice Tom Montagu-Smith QC in AIFC Court Case No 13 of 2021 upheld a grant by the arbitrator of interim (freezing order) relief. For the purposes of an application to set aside an award under Article 44(3), the relevant date is however "the date on which [Aksaystroy] received the award". The relevant award is here dated 18 February 2022, but it appears from the court file that it was only sent to the Parties by email by the arbitrator on 21 February 2022. Accordingly, Aksaystroy had until 21 May 2022 to apply under Article 44(3). But even if 18 February 2022 was the relevant date, Aksaystroy had until 18 May 2022. Either way, the present application dated 18 May 2022 is in time. It is in the circumstances unnecessary to consider whether there may be any basis on which the AIFC Court might be able to extend the three month period in Article 44(3). It follows from the above that point b) also fails and must be dismissed.

13. Point (c) therefore arises. Aksaystroy's application introduces this point with the statement that "The Claimant does not agree with the arbitrator's decision of 18.02.22 …. on the following grounds: …..". Similarly, in a written submission filed after the oral hearing, Aksaystroy submits that any conclusion that there had been proper delivery of the goods is "fundamentally wrong". These are unpromising starts to a submission that the arbitrator exceeded her jurisdiction. A challenge to an arbitrator's jurisdiction involves showing that the arbitrator decided some matter outside the scope of the matters submitted to her. An assertion that a party "disagrees" with the arbitrator's decision or that she reached a "wrong" conclusion goes nowhere towards showing that she exceeded her jurisdiction. A losing party in arbitration not infrequently disagrees with the award or with issues decided in it. But that says nothing about the arbitrator's jurisdiction.

14. The question under Article 44(2)(a)(iii) is not, therefore, whether a party complaining agrees or disagrees with the award or views it as "wrong". It is equally not whether the Court itself agrees or disagrees with the award or regards it as "right" or "wrong". It is one of the basic features of most commercial arbitration that arbitration awards are generally final and non-appealable (or "non-reviewable") on their factual or legal merits. This is a feature often viewed by commercial parties - at least until they lose - as an

advantage of arbitration. Parties who agree to arbitration need to be aware of this principle of finality or non-reviewability. They need to be clear before agreeing to any arbitration agreement that this is what they want – and also that this is what they will have to accept if they lose for reasons with which they do not agree. Court proceedings are different, because court procedures generally enable at least one appeal on factual or legal issues, subject to any requirement for permission to ensure some minimal prospect of success. This is what the AIFC Court, by its appeal system, allows for proceedings initiated before it (whether initiated within its exclusive jurisdiction or by agreement or under a choice of AIFC Court clause): see Part 5 of the AIFC Court Regulations and Part 29 of the Rules of the AIFC Court. If a party wishes to reserve a possibility of reviewing the rights or wrongs of a first instance decision, it may always prefer or seek to negotiate a choice of court clause as an alternative to an arbitration clause.

15. What is within an arbitrator's jurisdiction depends upon a consideration of the scope of the issue(s) submitted to arbitration. Here, the essential issue submitted was whether due delivery had been made, rendering price due under a contract for supply of metal goods. The short answer to the present application is, for reasons elaborated in greater detail below, that the arbitrator found that due delivery had been made and that the price was due; and that her decision, whether right or wrong, was in respect of issues which were submitted to her to decide, and so fell within her jurisdiction.

16. The (sole) ground for setting aside the award on which Aksaystroy relies is, as stated, excess of jurisdiction. There are in Article 44(2) and (3) of the Arbitration Regulations some other, limited grounds (modelled on those found in the New York Convention 1958) on which the Court has power to set aside an arbitration award. But all these grounds are strictly limited and none of them enables the Court to review the merits of an arbitrator's award or decision on substantive issues, whether of fact or law, made within her or his jurisdiction.

17. Aksaystroy has not by its written or oral submissions shown any grounds for considering that arbitrator Yeleusizova acted in any respect in excess of her jurisdiction. For the most part, the grounds invoked by Aksaystroy involve recitation of matters which the arbitrator addressed in her award, coupled with reasons given for disagreeing with her. As already explained, such grounds do not go to jurisdiction. They simply challenge the arbitrator's

decision on matters within her jurisdiction. To repeat, even if the Court were to conclude that the arbitrator appeared to have been wrong in the way she viewed or decided particular matters or the claim as a whole, that would be irrelevant. The question under Article 44(2) is not whether she was right or wrong, but whether her decision observed the limits on her jurisdiction. Courts as well as arbitrators do from time to time err in their reasoning and decisions in the course of exercising their jurisdiction. The only remedy for error as such is, where available, an appeal, but, as has been pointed out, arbitration does not generally offer that remedy.

18. Aksaystroy also describes the arbitrator's conclusion that delivery was made in Aktobe as a complete and unfounded contradiction, based on a failure to familiarize herself with the letter No 228 of 25th October 2021. This letter recorded that MetallInvest "had shipped metal" under the Agreement "to your facility in the city of Uralsk". Several points may be made about Aksaystroy's reference to the letter of 25th October 2021. First, where delivery was to be made depends on the contractual documentation, not on a letter written some months later. Second, and in any event, the letter is not in the Court's view inconsistent with the arbitrator's conclusion that delivery was made in Aktobe. Third, even if the Court were, in the light of the letter or the contractual documentation, to disagree with the arbitrator's decision, that would not mean that she exceeded her jurisdiction. Fourth, the Court in fact sees no reason to disagree with the arbitrator's conclusion that, under the relevant contractual provisions, the consignments were to be accepted and delivered at MetallInvest's warehouse in the city of Atyrau, not in the city of Uralsk (although that is clearly the place to which they were destined to be carried after acceptance and delivery and at which they were evidently to be used by Aksaystroy in a building construction project). Acceptance and delivery refer, in the context of the present contract between MetallInvest and Aksaystroy, to the point at which the possession of, and the risk of loss of or damage to, the goods were, under the contract, to pass from MetallInvest as supplier to Aksaystroy as buyer.

19. In this connection, the Delivery Agreement provides expressly:

> "QUANTITY AND QUALITY OF GOODS
>
> …..
>
> 2.2. Acceptance by the Buyer of the Goods in terms of quantity and quality is

carried out at the Supplier's warehouse, the address of which is specified in this Agreement.

…..

DELIVERY OF THE GOODS

5.1. The Goods are delivered from the Supplier's warehouse, within the terms agreed by the Parties in the Specifications, invoices, or invoices and invoices for the corresponding Goods. The Supplier is obliged to notify the Buyer of the readiness of the Goods for shipment no more than 3 (three) working days before the date of shipment.

….

5.3. The Goods are delivered on the terms of its pickup by the Buyer from the Supplier's warehouse, unless otherwise provided by the Parties in the Specification.

….

5.8. Together with the delivered Goods, the Supplier is obliged to transfer to the Buyer the following documents related to the shipment:

- Supplier's invoice;
- bill of lading;
- a copy of the quality certificate or other similar document, certified by the seal of the Supplier;
- certificate of work performed – in case the Supplier provides the Buyer with services for cutting, delivery of Goods to the Buyer, etc. ….

….

5.10. Acceptance of the Goods is carried out by the Buyer's representative acting on the basis of the relevant power of attorney from the Buyer. The signing by the Buyer's representative of an invoice for the corresponding Product means that the Buyer accepts this Product from the Supplier in terms of quantity and quality, and there are no claims against the Supplier regarding obvious defects of the Product.".

20. Further, as noted in paragraph 2 above, all three contractual documents, the Delivery Agreement dated 6 August 2021 and the Additional agreement No 1 and Specification No 3 specify as the address for transfer of the goods MetallInvest's warehouse at 105

Pozharsky Street, Aktobe. In addition, Specification No 3 states: "Place of acceptance of the Goods: the Supplier's warehouse at the address of Aktober, Pozharsky Street 105A".

21. Far from the arbitrator misreading the letter dated 25 October 2021, the Court considers it to reflect the contractual position, under which delivery of consignments was to be made on their collection and shipment from MetallInvest's Aktobe Goods transfer warehouse, as defined in the contractual documentation. The information given in the letter that MetallInvest "had shipped metal" under the Agreement "to your facility in the city of Uralsk" is in the Court's view entirely consistent with delivery occurring, as the Agreement provides, on shipment from the warehouse. Looking at the documents produced to the Court with the application and following the hearing, the delivery which the arbitrator found to have occurred evidently involved a Mr Butko O.V., as head of MetallInvest's Goods transfer warehouse, and Mr Bikmukhambetov R.R. accepting the goods for Aksaystroy. That was, as stated, a conclusion on a matter that was clearly and directly within the arbitrator's jurisdiction. Aksaystroy's objection to its correctness gives no basis now to challenge it before the Court.

22. Aksaystroy relies on a number of further points, all associated with the question whether delivery was actually made. It refers to the alleged theft, giving rise to the criminal case initiated in Uralsk on 2 November 2021, the establishment and initial interviewing of the circle of suspects, and the police measures to establish the location of the goods. It states that the Reconciliation Act and accounting documents were signed on trust that delivery would be or had been made. Elaborating on these points, Aksaystroy questions the very delivery of the goods and the genuineness of the signatures attesting to its acceptance of the goods at the Aktobe warehouse. It states that Mr Bikmukhambetov "has shown that on all three bills of lading [a reference to the three goods issue slips] …. his signature as a trustee [i.e. holder of a power of attorney] of Aksaystroy … was forged, i.e. this person showed that he allegedly did not receive the goods ….", that this is now being checked and established by the investigating authorities, and that visual comparison alone of the purported signatures on the goods issue slips with the power of attorney make it "really clear to the naked eye that the signature was forged". Carrying this further, the application at its end also submits that the rendering of the arbitration award while police enquiries were proceeding amounted to "direct and illegal interference in the activities of the investigating police in the framework of the initiated criminal case".

23. None of the matters set out in the previous paragraph goes to the arbitrator's jurisdiction. On the contrary, most if not all appear to have been put before her in the course of her exercise of her jurisdiction. As a matter of fact, it is far from clear when and how Mr Bikmukhambetov is suggested to have "shown" that his signature was forged. Nothing by way of statement from him to that effect has been shown to the Court or is referred to by the arbitrator. Aksaystroy's submission before the arbitrator appears to have been that an obvious difference between the power of attorney specimen and the three signatures on the goods issue slips established "doubt" about the genuineness of the latter. Further, Aksaystroy's lawyers wrote to the criminal investigators in Uralsk on 16 June 2022 noting that Mr Bikmukhambetov was "recognised as a suspect" and requesting that he be asked whether he received the goods and confirms his signature on the goods issue slips. That suggests that he had not previously been approached or asked to do this. The investigators' response on 17 June 2022 was that he had been out of Kazakhstan, but that he had said that he would be back at the end of June 2022. In fact, he was evidently back by 24 June 2022, when he made a notarial statement for MetallInvest saying that he had not given any evidence in the criminal investigation about non-delivery of the goods, but had, on the contrary, confirmed his acceptance of the goods and the corresponding invoices at MetallInvest's Aktobe warehouse.

24. The previous paragraph includes matters which were not, and could not have been, before the arbitrator, and so are mentioned only for completeness, because they appear from documents put before the Court by the parties. So far as concerns the arbitrator and her jurisdiction to make her award, all that matters is that she was asked to determine whether the price was due as a result of due delivery of the goods and that is what she did. She was aware of the "doubt" suggested regarding the signatures on the goods issue slips, but this does not appear to have been supported by any document or by more than an assertion that the signatures differed from that on the Ministry of Finance record of powers of attorney. She was not given the benefit of the expert handwriting evidence which a tribunal would normally expect to be given in such circumstances. Lay assertions about the clarity "to the naked eye" of a forgery are not often very persuasive. Aksaystroy complains before this Court that the arbitrator should have given time or further opportunity to disprove the genuineness of Mr Bikmukhambetov's signature. But no

formal request was made to the arbitrator by Aksaystroy to be given time to reinforce its case (or even it appears to await developments in the criminal proceedings). In any event, the arbitrator's decision to proceed to an award on the material before her was a decision reached in the exercise of her jurisdiction. None of the points raised in this area affects the arbitrator's jurisdiction or suggests any respect in which she exceeded it.

25. Aksaystroy's further suggestion that the arbitrator's making of her award amounted to "direct and illegal interference in the activities of the investigating police" has no force. She had before her a civil claim to the price, which depended on whether delivery had been made. An award in such a claim does not and cannot "interfere" with ongoing police or criminal activities or proceedings. The outcomes of a civil claim and a criminal investigation may of course prove to be or to point in different directions, and the arbitrator might, as a matter of discretion, have considered adjourning the arbitration proceedings to await developments in the criminal investigation. But she was not obliged to do this and did not exceed her jurisdiction by adjudicating on the civil claim which was before her. She was evidently satisfied that the claim was good - meaning that any shortage or abstraction occurred at a point after the acceptance and takeover of the goods by Aksaystroy at MetallInvest's warehouse, and that the Uralsk criminal investigation was thus concerned with alleged post-delivery loss either en route to or in Uralsk.

26. Aksaystroy also complains that it is not shown that the documentation referred to in clause 5.8 of the Delivery Agreement was issued on or against delivery. It further refers in this connection to paragraph 12 of the Rules for the Transportation of Goods by Road, approved by Order of the Minister for Investment and Development of the Republic of Kazakhstan dated 30 April 2015 No 546. According to such Rules (in a somewhat imperfect translation provided by Aksaystroy):

> "12. Transportation of goods is issued by waybills on paper or in the form of electronic digital document.
> The bill of lading is the main transportation document, according to which the consignor writes off the shipping cargo and capitalizes it by the consignee.
> 13. The consignor submits to the carrier a consignment note for the goods presented for transportation, drawn up in four copies if issued on paper.
> …..

15. Acceptance of goods for transportation from the consignor is certified by the signature of the carrier in all copies of the bill of lading in case of registration on paper.

The first copy remains with the consignor and is intended for writing off the goods presented for transportation. The second, third and fourth copies are handed over by the consignor to the carrier.

….

19. The waybill of a motor vehicle is a primary accounting document, which, together with the consignment note, determines the indicators for accounting for the operation of the vehicle.

….

Waybills of a motor vehicle and bills of lading, issued on paper, are subject to registration in the registers of the movement of waybills and waybills, and storage by the carrier together with the journals for 5 years.

20. Waybills and bills of lading are issued by the carrier on paper or in the form of an electronic digital document for one shift (flight) before the start of the shift (flight) separately for each freight vehicle ……"

27. In fact, the Court has before it from the original application signed goods issue slips dated 7 and 28 August 2021 for the three relevant batches, and MetallInvest has since the hearing also produced consignment documents, consisting of route sheets, customer coupons, consignment vouchers, transport documents, business trip instructions, certificates and travel expense documents as well as goods invoices, all of which it says were before the arbitrator. Even if there were any basis for considering that these documents did not strictly satisfy clause 5.8 of the Delivery Agreement or Kazakh Rules for the Transportation of Goods by Road (and the Court does not see any), that would be, at most, a matter for the arbitrator to consider, when exercising her jurisdiction, not a matter capable of going to her jurisdiction. The Court would only add that, if, as the arbitrator found, the goods were actually delivered by MetallInvest to Aksaystroy, it is difficult to see how or why any non-compliance with either the contractual provisions regarding delivery of bills of lading or the provisions of the ministerial Rules for the Transportation of Goods by Road could deprive MetallInvest of its right to the invoice price.

28. Although the Court has sought to some extent to analyse as well as identify the substantive points which arose in the arbitration and which are very largely sought to be raised again in and by Aksaystroy's application, the reality at the end of the day is that the arbitrator found that delivery had been affected and the price was due. There is nothing to mean or show that she exceeded her jurisdiction either in, or in the course of reaching, that conclusion. There may have been matters she might further have explored or elucidated, or further matters which might have been argued before her, but that is not to the point. The Court repeats and underlines that, where parties agree on arbitration, the Court does not have an appellate role. The grounds for intervention provided by Article 44(2) and (3) are modelled on the New York Convention and are deliberately confined. The Court's only, limited, task is, in the present case, to determine whether the arbitrator's award "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration". Here, whatever criticisms might be addressed to its substance, and many have been suggested and some of them analysed in this judgment, the position at the end of the day is that the arbitrator's award dated 18 February 2022 was concerned with and dealt with the disputed claim that due delivery had been made and that the price was accordingly due. It did not deal with any matters outside the scope of that issue.

29. The claim by Aksaystroy-2020 LLP to set aside the final award of Arbitrator Yeleusizova Indira dated 18 February 2022 therefore fails and is dismissed. Costs must follow the event, unless cause to the contrary is shown by written submissions to be lodged with the Court within ten days after the date of this judgment.

By Order of the Court,

The Rt. Hon. The Lord Mance
The Chief Justice of the AIFC Court, 29 July 2022

Representation:

The Claimant was represented by Mr. Ruslan Kenzhegaliyev, lawyer, Aksaystroy – 2020 LLP.

The Defendant was represented by Mr. Rakhat Azhgaliyev, lawyer, MetallInvestAtyrau LLP.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

19 December 2022

CASE No: AIFC-C/SCC/2022/0021

KOZHABAY ABDILDA ALIBEKULY

Claimant

v.

"QOSIL LIMITED" PRIVATE COMPANY

Defendant

JUDGMENT

Justice of the Court:

Justice Charles Banner KC

JUDGMENT

Introduction

1. By this claim, the Claimant, Mr Abdilda Kozhabay, seeks damages against the Defendant, Qosil Limited, in connection with the termination of what he says is an employment contract between them. The claim is brought in reliance upon the AIFC Employment Regulations (AIFC Regulations No. 4 of 2016) ("**the Employment Regulations**"), disputes concerning which are subject to the jurisdiction of the AIFC Court: see Regulation 4(3).[1]

2. The Court has had the benefit of written evidence and submissions from each party, which were elaborated at a remote hearing which took place via Zoom on 7th December 2022, at which the Claimant represented himself and Mr Batykov represented the Defendant. The Court is grateful for the high quality and concise manner by which each party has presented its written and oral arguments.

The factual background

3. On 11th July 2022 the Claimant applied for an advertised job vacancy with the Defendant. On 19th July, the Defendant's Ms Ulzhan Issakhova contacted him via Whatsapp with a view to arranging an interview. That interview took place later the same day by video. The participants were the Claimant, Ms Issakhova and the Defendant's Managing Director, Mr Furuk Hunter.

4. At the conclusion of the interview, Mr Hunter on behalf of the Defendant offered the Claimant a job. Mr Hunter indicated that he was outside the country. The Claimant says, and the Court accepts, that Mr Hunter told him that the necessary[2] written contract of employment would therefore be signed by Ms Issakhova on behalf of the Defendant.

5. On 1st August 2022, Ms Issakhova sent the Claimant a contract for his employment by the Defendant as a Field and Vendor Manager (contract number 50048222) for his signature. The contract already bore Ms Issakhova's signature, expressly on behalf of the Defendant. The Claimant signed and returned it the same day.

6. The Claimant proceeded to work for the Defendant for more than one month. On 9th September 2022, he contacted Ms Issakhova to request the payment of his salary due under the contract, namely 375,000 Tenge per month. She replied stating that she no longer worked for the Defendant. The Claimant then contacted Mr Hunter. Mr Hunter then indicated that the Defendant would not pay the Claimant's salary on the basis that there was no valid employment contract between them.

7. Accordingly, the Claimant has brought these proceedings before the Court, seeking 562,000 Tenge in unpaid wages for the work he had done for the Defendant, together with an additional 375,000 which he describes in his Claim From as *"moral damages as I was unable to find another job since I was still under the contract with the Company".*

8. The Defendant's case, as confirmed by Mr Batykov at the hearing, is that only Mr Hunter had authority within the company to sign the contract, and therefore Ms Issakhova's signature on it was not

[1] Note Clause 18.1 of the contract further provides: "*This Contract of Employment will be governed by the acting law of the AIFC"*.

[2] See Regulation 11(1) of the Employment Regulations, discussed further below.

effective. Mr Batykov points to Regulation 11(1) of the Employment Regulations, which provides that *"An Employee may only be employed under a Contract of Employment that is written in English and signed by both the Employer and the Employee"*. He submits that, in the present case, Ms Issakhova did not have authority to sign the contract on behalf of the Defendant and therefore it as not *"signed by…the Employer"* for the purposes of Regulation 11(1).

9. The Claimant says, and the Defendant does not dispute, that he was entirely unaware that Ms Issakhova, when she signed the contract purportedly on behalf of the Defendant, did not have power to do so. Indeed, as noted above, Mr Hunter had expressly stated on 1st August that the contract would be signed by Ms Issakhova because he was out of the country at the time. Further, the hearing, the Claimant clarified (in response to questions from the Court) that Mr Hunter was fully aware that the Claimant was working for the Defendant in reliance on the contract during August and early September 2022. The Defendant did not dispute this evidence either.

10. Mr Batykov also clarified at the hearing that the Defendant no longer maintains an allegation previously made in correspondence (but not pursued in the Defendant's statement of case or written submissions) that the signature on its behalf on the contract was the product of a fraud. Its case on liability is confined to the argument that under the Defendant's company structure Ms Issakhova did not have power to sign the contract.

11. The Defendant also submits that, even if there was an effective contract of employment, the Claimant is not entitled to any damages because he failed to submit any time sheets. Mr Batykov confirmed at the hearing that the Defendant does not dispute the Claimant's calculation of damages on any other basis.

12. There are therefore two issues for determination by the Court:
    (1) Does the Claimant have an employment contract to which the Employment Regulations are applicable?
    (2) If so, what if any damages is the Claimant entitled to?

Issue 1: Does the Claimant have an employment contract to which the Employment Regulations are applicable?

13. The Court unhesitatingly concludes that the answer to this first question is 'Yes'. This is for either or both the following reasons.

14. First, Ms Issakhova had "ostensible" or "apparent" authority to enter the contract on behalf of the Defendant. She was the Claimant's point of contact with the Defendant in the context of his job application and interview, and Mr Hunter told the Claimant at that interview that she would sign the contract on behalf of the Defendant, which she then did. The Claimant had no reason to doubt that she had actual authority to sign the contract, and he entirely reasonably relied upon the contract in thereafter undertaking work for the Defendant. Applying the principles derived from the judgment of the Court of Appeal of England & Wales in ***Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd*** [1964] 2 Q.B. 786 and subsequent case-law applying that judgment,[3] principles which

[3] See most recently ***Minister of Finance of Ukraine v. the Law Debenture Trust Corporation plc*** [2018] EWCA Civ 2026, [2019] 2 W.L.R. 655.

the Court considers are to be applied in the context of the Employment Regulations, this ostensible or apparent authority was sufficient for the contract to become binding between the parties.

15. Secondly, in any event, Mr Hunter was aware that the Claimant and Defendant had entered into the contract and was content to allow the Claimant to undertake work for the Defendant pursuant to its terms. Therefore, even on the Defendant's case that Mr Hunter was the only person able to enter into legal relations with the Claimant on the Defendant's behalf, the Court finds that he did so: through his conduct the Defendant assumed the terms of the contract and/or is estopped from denying that it is bound by the terms of the contract.

16. The Court is reinforced in these conclusions by the implications of the Defendant's contrary analysis. As Mr Batykov accepted at the hearing when questioned by the Court, it would follow from the Defendant's submissions that an employer could avoid the obligations imposed by the Employment Regulations by arranging for an employee's contract of employment to be signed purportedly on behalf of the employer by an officer of the employer who, unbeknown to the employee, lacks authority under the employer's corporate structure to enter into the contract. Thus the protections afforded to employees under the Employment Regulations could be circumnavigated even in the case of someone employed for many years under the illusion of a validly completed employment contract. Such an outcome would be plainly contrary to the purposes of the Employment Regulations, defined in Regulation 3 in the following terms:

    "The purpose of these Regulations is to:

    (a) provide minimum employment standards for Employees who are based in, or ordinarily work in or from, the AIFC; and

    (b) promote the fair treatment of Employees and Employers; and

    (c) foster employment practices that contribute to the prosperity of the AIFC."

17. Regulation 11 of the Employment Regulations should be interpreted in that light. This supports the conclusions the Court has reached at paragraphs 14 and 15 above.

Issue 2: What if any damages is the Claimant entitled to?

18. The Court rejects the Defendant's submission that the Claimant need to provided timesheets in order to be entitled to his wages. There is no basis in the contract for such a submission. The Court asked Mr Batykov what was the contractual basis for this part of the Defendant's case and he was unable to point to any clause in the contract which provided such a basis. Clause 3 and Schedule 1 of the contract, taken together, clearly provide that the employee's monthly wage is 375,000 Tenge.

19. The Court accepts the Claimant's calculation of his wages due under the contract for the period during which he worked for the Defendant as 562,000 Tenge. No alternative calculation was put forward by the Defendant.

20. By denying the existence of the contract and refusing to pay the Claimant, the Defendant effectively terminated the employment, thereby triggering Part 10 of the Employment Regulations. Within this Part, Regulation 60(2) entitles the Claimant to 7 days' paid notice. That entitles the Claimant to an additional sum of 86,538 Tenge. This is the amount that, in these circumstances, the Employment

Regulations deem appropriate for the unforeshadowed termination of the employment contract, leaving the Claimant having to find another job. The Claimant's request for an additional sum of "moral damages" over and beyond this amount (equating to a month's paid notice) does not have any basis in the Employment Regulations or in the contract itself.

21. The total amount therefore payable by the Defendant to the Claimant is 648,538 Tenge.

Conclusion

22. The Claim is allowed.

23. The Defendant shall pay the Claimant the sum of 648,538 Tenge within 7 calendar days of this judgment.

By Order of the Court,

Charles Banner KC,
Justice, AIFC Court

19 December 2022

Representation:

The Claimant was represented by himself.

The Defendant was represented by Mr. Rauan Batykov, lawyer, ILFA & A International Law Firm.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

10 October 2022

CASE No: AIFC-C/CFI/2022/0020

FREEDOM FINANCE JSC

Claimant

and

EGOR ROMANYUK

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Rupert Jackson

JUDGMENT AND ORDER

1. On 1 February 2020 the claimant and the defendant entered into a separation and release of claims agreement (the agreement'), under which the defendant ceased to be employed by the claimant after 1 February 2020.

2. By clause 3 of the agreement the claimant agreed to pay the defendant USD $100,000 as a separation benefit. That sum was duly paid on 3 March 2020.

3. The defendant provided a number of covenants in the agreement, including not to disclose confidential information or to disparage the claimant.

4. Clause 9 of the agreement provided:

   "In the event of a material breach by the Employee of any of the provisions of this Agreement, the Employee hereby acknowledges and agrees that the Employer shall be entitled to seek, in addition to other available remedies, an award for liquidated damages in an amount equal to $5,000,000 for each material breach (the "Liquidated Damages"). The parties acknowledge and agree that the employee's harm caused by a material breach would be impossible or very difficult to accurately estimate at the time of the breach and that the Liquidated Damages set forth herein is a reasonable estimate of the anticipated or actual harm that might arise from a material breach."

5. The claimant alleges that the defendant has committed numerous breaches of the agreement.

6. By a claim form issued in the AIFC Court on 11 August 2022 the claimant claimed liquidated damages against the defendant.

7. On 6 September 2022 the claimant's attorney effected service of the claim form (in accordance with paragraph 130.2 of the Civil Procedure Code) upon the defendant's address designated for service in clause 18 of the agreement. The defendant was not present at that address, but I am satisfied on the evidence that he has been made well aware of these proceedings on more than one occasion.

8. The defendant failed to acknowledge service within fourteen days or at all. The claimant now seeks judgment in default under Part 9 of the AIFC Court Rules for the sum of USD $5 million.

9. The claimant is entitled to judgment in default, but I have a concern as to whether the claimant is entitled to recover the full $5 million specified in clause 9 of the agreement. If this case were proceeding under English law, it would be necessary to decide whether that provision was an unenforceable penalty. The present contract, however, is subject to Kazakhstan law.

10. In a case where the penalty is excessively large compared to the losses of the creditor, Article 297 of the Kazakhstan Civil Code enables the court to reduce the amount of a penalty "considering … the interests of the debtor and the creditor that deserve attention". It is impossible to tell on the basis of the documents before the court whether it is appropriate to exercise that power in the present case.

11. In the circumstances, I order that there be judgment for damages to be assessed.

12. There must be a hearing to determine the amount of damages due. This may turn out to be $5 million or some lesser sum. As a preliminary step, there must be a directions hearing by video-link. One problem which we must consider at the directions hearing is the fact that there will probably be only one party before the court at the hearing of the assessment of damages. The issue is quite a difficult one, which requires argument on both sides. I request assistance from the claimant's counsel and from the Registrar as to whether the court can engage an *amicus curiae* to assist at the hearing of the assessment of damages.

By the Court,

Sir Rupert Jackson
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Bakhyt Tukulov, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

25 August 2022

CASE No: AIFC-C/CFI/2022/0019

NAR TIRES LLP

Claimant

and

NUR METALL KZ LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. The Lord Faulks QC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 10 August 2022 the Claimant seeks an Order from this Court to enforce the measures set forth in section 39 of the Arbitration Award dated 8 July 2022 made by Ms. Indira Yeleusizova, the sole arbitrator appointed by a letter dated 7 April 2022 of Ms. Barbara Dohmann QC, the Chairman of the International Arbitration Centre of Kazakhstan, in Case IAC Arbitration No. 13/2022.

2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

   That Nur Metall KZ LLP pay to Nar Tires LLP:

   (1) the principal amount of 420,000 (four hundred and twenty thousand) tenge,

   (2) a penalty in the amount of 270,000 (two hundred and seventy thousand) tenge,

   (3) the amount of costs associated with arbitration of the dispute in the amount of 150,000 (one hundred and fifty thousand) tenge.

   By no later than 6pm Nur-Sultan time on 15 September 2022, being 21 days from the date of this Judgment and Order.

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

By the Court,

Representation:

The Claimant was represented by Mr. Arlan Sarkytbekuly, Arlan Sark Law Firm, Almaty, Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 December 2022 &
17 January 2023

CASE No: AIFC-C/CFI/2022/0017

TENAZ MANAGEMENT LLP

Claimant

v

CHI ELECTRIC LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Rupert Jackson

JUDGMENT AND ORDER

1. In this action the Claimant, Tenaz Management LLP, seeks to recover a debt against CHI Electric LLP, the Defendant, in respect of services rendered. The Defendant does not dispute the amount of the principal debt. The Defendant has been progressively making payments in recent months, and the debt has now been reduced to 240, 174, 056 tenge. There is no dispute about the amount of the principal debt or the sums which have been paid. There is no dispute that that is the outstanding balance. I must therefore give judgment for that sum. I will deal later with the question of time to pay.

2. The Claimant also seeks a late payment debt of 100 million Kazakhstan tenge. The entitlement to recover such a debt arises under Article 7.2 of the Contract between the Parties. There is a dispute between the Parties as to whether or not it was agreed between the representative of the Claimant and the representative of the Defendant that the amount of the late payment debt should be reduced to 47 million tenge. Ms. Kubenova, who appears for the Defendant, says that the agreement was reached between the Chief Executive Officer of the Defendant and the representative of the Claimant, whose first name was Alex. Mr. Berzhanov, who represents the Claimant, says that there was no such agreement.

3. Article 297 of the Kazakh Civil Code enables a penalty under a provision such as Article 7.2 to be reduced having regard to

> *"… the degree of fulfillment of the obligation by the debtor and the interest of the debtor and creditor that deserve attention."*

   Ms. Kubenova has told me a certain amount about the circumstances of her client, the employees whose jobs are at risk if CHI enters bankruptcy and so forth. Mr. Berzhanov in response to my question said that because of the late payment of the debt, the Claimant has lost the business opportunities, and matters such as that and has therefore been prejudiced. Mr. Berzhanov has asked me to give judgment today without waiting to hear any further evidence about that matter. I have come to the conclusion that having regard to the alleged agreement, about which I cannot make any final determination, and having regard to the circumstances of this case, I should reduce the amount of the late payment penalty to 47 million tenge. So, I give judgment for 47 million tenge under that limb of claim.

4. The next matter in the dispute is the cost of notarial services. The Claimant seeks payment of 309, 331 tenge for notarial services. The Defendant does not dispute that figure. When I asked Ms Kubenova, she did not. There are various receipts in the documents before me. The Defendant makes the point that since the transfer to this Court was done by agreement, her client should not have to pay the cost of notarial services. I do not accept that submission, since that expense is the part of the necessary cost of transferring the case to this Court. There are other benefits, which I shall come to shortly, as a result of transferring the case to this Court. But the Defendant is liable for costs. Therefore, I award 309, 331 tenge in respect of notarial services.

5. The next issue is the claim for state duty, which the Claimant paid when lodging this case in the Astana district court. Mr. Berzhanov, for the Claimant, says that this amounted to 10% of the claim and was 10 million tenge or to be precise, 10 205 221 tenge. However, Ms. Kubenova says that that sum should not be paid by her client at all, it is not a sum for which the Defendant can be liable, and the Claimant should recover that from the state. I think that Ms. Kubenova is right on this particular issue. The

Claimant can recover the state duty, which it has paid. It is entitled to make such recovery under Article 280 of Kazakhstan Civil Procedure Code.

6. The final issue is the legal costs. The Claimant seeks 24 million tenge as costs. Ms. Kubenova for the Defendant says that it is far too much. I am not in a position to decide that today. I therefore direct that the Claimant should provide details of the costs it incurred, which the Claimant says, amount to 24 million tenge, within 7 days. The Defendant should respond with any comments on the Claimant's costs within 7 days thereafter. So, the Claimant's costs should be lodged by 20 December 2022. The Defendant's comments should be provided by 27 December 2022. I will either assess costs in writing, alternatively, I will do so orally at the hearing in January.

7. I now come to time to pay. Ms. Kubenova has made powerful submissions to the effect that her client is doing its best to pay the debt. She says the Defendant has paid substantial sums. It expects to be able to continue doing so at a significant rate. I order that the Defendant must pay 100 million tenge by 31 December 2022. The Defendant must pay a further 100 million tenge by 17 January 2023. I will have a hearing in Kazakhstan on 17 January 2023 to deal with the remaining issues. I will retain the hearing on 17 January 2023, which had originally been fixed for the trial of the action. I will set out a timetable for paying the balance of the debt on that date. If I have not done so before 17 January 2023, I will give a decision on the Claimant's claim for costs on that date.

By the Court,

Sir Rupert Jackson Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Tabyldy Berzhanov, Managing Partner of Legal Services Provider Co. Ltd, Astana, Republic of Kazakhstan.

The Defendant was represented by Ms. Zarina Kubenova, CHI Electric LLP, Aktobe, Republic of Kazakhstan.

The matter came back to the AIFC Court on Tuesday 17 January 2023 and the AIFC Court made the following Orders:

Order on the payment of the balance

1. I thank both counsel for their submissions. I do appreciate that the Claimant has been out of pocket for a long time and it needs the money. I also appreciate that in the present difficult economic circumstances the Defendant is struggling to pay and I accept that there have been delays in other contractors paying debts to the Defendant.

2. Weighing up the considerations on both sides, I will allow four weeks from today for the payment of the balance. Four weeks from today will be Tuesday 14th February 2023. I Order that the Defendant do pay the balance by 14th February 2023. The balance will be 87,483,377 tenge by my calculations.

Order on legal costs

3. This is an application for costs which is strongly disputed. The Claimant says that the costs incurred are 24 million Kazakh tenge and has produced an invoice to show that is what the lawyers have charged their client and that is what the client has paid. So the claim is for 24 million tenge. The Defendant says that although Article 113 of the Civil Procedure Code, upon which Mr. Berzhanov relies, applies, nevertheless, this is a very simple case. The amount of the debt has been admitted. There is no great complexity and the Defendant proposes that the costs should be USD 1,620 converted to Kazakh tenge at today's rate.

4. Mr. Berzhanov, as I say, places reliance upon Article 113 of the Civil Procedure Code which provides as follows:

   "At the request of the party, in favour of which the decision was made, the Court shall adjudge expenses, incurred by it on payment for the assistance of a representative or several representatives, participated in the process and which is not party of labour relations, in the amount of actually incurred expenses by the party. Total amount of these expenses on recovery shall not exceed ten percent of the satisfied part of the claim. Amount of expenses by non-property claims shall be recovered within due limits, but shall not exceed three hundred monthly calculation indexes".

5. Mr. Berzhanov says that it is appropriate in this case in accordance with Article 113 to assess costs in the sum of 10% of the claim which amounts to 24 million Kazakh tenge. Mr. Berzhanov cites the decision of Judge Saudabaev in case No.2301-22-00-2/1612 dated 31st October 2022. That was a case in which costs were indeed assessed in the sum of 10% of the primary award.

6. Ms. Kubenova draws the Court's attention to paragraph 14 of the Normative Resolution of the Supreme Court of the Republic of Kazakhstan dated 25th December 2006. That paragraph in so far as material provides as follows:

"In the event of an excessively high documented amount of expenses by payment order or receipt for the assistance of a representative who participated in the proceedings on non-property claims, the Court should be guided by the criteria of good faith, fairness and reasonableness, provided for in Article 8 paragraph 4 of the Civil Code and Article 6 paragraph 5 of the Civil Procedure Code".

7. Ms. Kubenova submits that the sum of costs claimed in this case are "excessively high" and that provision in paragraph 14 should apply. I accept that submission. It does seem to me that the claim for 24 million tenge is out of all proportion to a case of this simplicity where the Claimant's solicitors were only instructed at a very late stage and where there was no dispute about the amount of the debt. Mr. Berzhanov has told me the amount of hours spent which seem to me to be excessive.

8. I have carefully considered the arguments on both sides, and I award the sum of 5 million tenge in respect of costs. That will therefore be added to the debt which I mentioned before, making a total sum of 92,483,377 tenge. That sum must be paid by the Defendant to the Claimant by 14th February 2023. I thank both counsel for the assistance in this case.

By the Court,

Sir Rupert Jackson Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Tabyldy Berzhanov, Managing Partner of Legal Services Provider Co. Ltd, Astana, Republic of Kazakhstan.

The Defendant was represented by Ms. Zarina Kubenova, CHI Electric LLP, Aktobe, Republic of Kazakhstan.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

15 August 2022

CASE No: AIFC-C/CFI/2022/0016

UNICORN FEED LIMITED

Claimant

v

INTER-TRADE 2050 LIMITED LIABILITY PARTNERSHIP

Defendant

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The Court sanctions under section 124 of the AIFC Companies Regulations the arrangement for amalgamation of the Defendant with the Claimant on the basis set out in the judgment below.

JUDGMENT

1. By a claim form issued on 2 August 2022 the Claimant applies for an order under section 124 of the AIFC Companies Regulations sanctioning an arrangement for amalgamation of the Defendant with the Claimant.

2. The Claimant is Unicorn Feed Limited ("the Company"), a Private Company registered in the Astana International Financial Centre. Unicorn Holdings Limited ("Unicorn Holdings") owns 100% of the shares in the Company.

3. The Defendant is Inter-Trade 2050 ("the LLP"), a Limited Liability Partnership. The Company is the sole participant of the LLP.

4. The claim is made under the Abridged Procedure in Part 23 of the AIFC Court Rules, in accordance with the guidance given by Justice Andrew Spink QC in previous cases in this Court (see Case No. 11 of 2021, *Wemining Limited v Wemining LLP*; Case No. 12 of 2021, *Unicorn Crops Limited v Kialy Agro-10 LLP & Others;* Case No. 2 of 2022*, Caspian Research Group Limited v Astana Invest LLP*). The relevant application is contained within the claim form. The LLP has not filed an acknowledgment of service in accordance with Rules 23.7 to 23.9 but its authorised representative has indicated by email to the Court Registry that the LLP does not contest the application and requests the Court to review the application in accordance with its content.

5. The documents supplied to the Court in support of the application include:

   (1) A written confirmation on behalf of Unicorn Holdings that for the purpose of resolving outstanding disputes between it and the Company, it has resolved among other matters to amalgamate the LLP with the Company and to approve an Agreement on Amalgamation in a form provided to the Court. This is confirmed in turn by minutes of meetings of the shareholders and Board of Directors of Unicorn Holdings held on 14 February 2022.

   (2) A resolution dated 14 February 2022 of the Company, as sole participant in the LLP, for reorganisation in the form of amalgamation of the LLP with the Company and approving the Agreement on Amalgamation among other matters.

   (3) The Agreement on Amalgamation itself. It provides for amalgamation of the LLP and the Company, with the transfer of all rights and obligations of the LLP to the Company. It sets out basic data on the balance sheets of the parties. It deals with the procedure for the reorganisation, including notification of creditors and relevant authorities, and it provides that at the end of the process the Company is to

become the legal successor of the LLP for all obligations of the LLP and that the LLP is to be excluded from the National Register of Business Identification Numbers of the Republic of Kazakhstan.

(4) Statements of notification of creditors of the Company and creditors of the LLP as to the proposed amalgamation. The Court has received no record of any objection by creditors.

(5) Statements on the financial position of the Company and the LLP, covering short-term and long-term liabilities and assets, and capital; and separate statements as to tax arrears/over-payments of the Company and the LLP.

6. Section 124 of the AIFC Companies Regulations applies by section 124(1) if a compromise or arrangement is proposed between a company and its shareholders. The section applies in this case on the basis that the matters summarised above constitute a proposed arrangement between the Company and its sole shareholder, Unicorn Holdings.

7. By section 124(2) the Court may order that a meeting of shareholders be held to vote on the proposal, and by section 124(3) the Court may sanction an arrangement if a majority in number representing threequarters of the voting rights of the shareholders present and voting at the meeting agree to the arrangement. However, the Court's power to sanction the arrangement under section 124(3) arises in this case without the need to order such a meeting, since the sole shareholder in the Company has already passed a resolution in favour of the proposal on the basis of full information as to the arrangement.

8. The Company and the LLP have both agreed to the arrangement and, according to the information provided in the claim form, have already signed the Agreement on Amalgamation.

9. The arrangement appears adequately to protect the position of third parties by the transfer of all rights and obligations of the LLP to the Company. It is true that the Court has only limited information as to the financial position of the amalgamated enterprise and that on the face of it the Company's overall liabilities exceed its assets; but the stated liabilities of the LLP are relatively small, creditors have been notified and, as noted above, the Court has received no record of any objection.

10. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under section 124(3).

By the Court,

Justice Sir Stephen Richards

Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Shynggys Oralbayev Beibituly, Grata Law Firm LLP.
The Defendant was represented by Mr. Adil Donakov Talgatovich, Grata Law Firm LLP.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

8 November 2022

CASE No: AIFC-C/CFI/2022/0015

JSC "Kazakh-Russian Joint Venture "Baiterek"

Claimant

and

JSC "Center for the operation Ground – based space Infrastructure"

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

JUDGMENT AND ORDER

1. This is a claim by the Claimants arising out of a Contract in relation to an unmanned space station. The Parties agreed a Contract price in accordance with the documents filed at the Court, and in the event of a dispute that dispute is to be referred to this Court, the language to be used was Russian.

2. The Claimants have claimed the total of 13 684 550 338.7 tenge. That sum is made up of the maximum, which is permitted under the Contract in relation to default by the Defendants in providing an environmental impact assessment. The Contract provides for a daily rate, but the maximum that can be claimed is that sum which is contained in the Claimants' claim.

3. The Defendants have not provided any substantial reasons as to why this sum should not be paid, why there is any excuse for not paying it, or whether there is any contractual dispute which would otherwise mean that the sum was not payable.

4. The only objection made by the Defendants to this claim, and they have been given adequate notice in my view of the nature of the claim, is the argument that this Court does not have jurisdiction. The Contract seems to me plainly to give this Court jurisdiction.

5. However, the Contract does explicitly provide that the language of any proceedings should be in Russian and that the Contract should be governed by the substantive law of the Russian Federation. I have heard today, and it is apparent from the Contract, that the Parties specifically chose to have disputes, if there were any, determined by these means. I am perfectly satisfied that this Court does have jurisdiction.

6. The fact that the Parties stipulated that the proceedings should be conducted in Russian does not undermine the Court's jurisdiction. It was made clear to the Defendants that the Court can provide an interpreter, so that even if witnesses and advocates wish to speak in Russian there can be a simultaneous translation into English. So that provides no difficulty to either Party in conducting this dispute. So, I am not satisfied from the very brief response from the Defendants that there is any merit in the argument that this Court does not have jurisdiction.

7. Once the Court has decided that it has jurisdiction, the question that arises as to whether the Claimants, on the evidence that has been filed, and on the basis of what Mr. Ibrayev has told the Court, can establish their entitlement to the sum claimed.

8. I have received no evidence or argument that this sum is not payable in accordance with the Contract. I have looked to the Contract price, I have looked to the relevant terms in relation to what is payable at the daily rate in relation to environmental impact assessment, which was a crucial part of the Contract.

9. There has clearly been no payment. I have been given no reason as to why there had not been an environmental assessment, there may or may not be good reason for it. In the absence of any explanation, I conclude that the Claimants are entitled to the sum claimed which has been clearly set out before me by the Parties. I accordingly give judgment in favour of the Claimants against the Defendants in the sum of 13 684 550 338.7 tenge.

Representation:

The Claimant was represented by Mr. Yerden Ibrayev, Executive Director on legal issues, JSC “KazakhRussian Joint Venture “Baiterek”.

The Defendant was represented by Mr. Aleksei Velikiy, Head of Forensic Defense, JSC “Center for the operation Ground – based space Infrastructure”

IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

24 June 2022

CASE No: AIFC-C/CA/2022/0014

JSC Cengiz Insaat Sanayi ve Ticaret A.S.

Appellant

v

The Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan

Respondent

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The application for permission to appeal is refused.

JUDGMENT

1. By a judgment dated 16 November 2021 in Case No. AIFC-C/CFI/2021/0005 the Court of First Instance of the Astana International Financial Centre gave judgment for the claimant, JSC Cengiz Insaat Sanayi ve Ticaret A.S. ("Cengiz"), in the sum of 1,335,170,366 tenge and ordered the defendant, the Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan ("the Committee"), to pay that sum to Cengiz within 28 days from the date of the order.

2. The Committee subsequently applied to the Court of First Instance for an extension of time for payment of the judgment debt. By a judgment dated 28 April 2022 in Case No. AIFC-C/CFI/2022/0001 the Court granted an extension of time for payment of the debt and ordered that the Committee must pay the debt on or before 30 September 2022.

3. Cengiz now applies for permission to appeal to the Court of Appeal against the decision of 28 April 2022. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.

4. In his reasons for granting an extension of time until 30 September 2022 for payment of the debt, the judge (Justice Sir Rupert Jackson) stated:

> "2. I have carefully considered the submissions of both parties.
>
> 3. The Committee for Roads is at fault in failing to take prompt steps to secure funds to meet the judgment dated 16 November 2021. On the other hand, the present position is that as a result of that fault the Committee is not currently able to pay the judgment debt.
>
> 4. I do not accept that the Committee needs a year in order to secure the necessary funds. There are procedures which need to be followed, but if the Committee moves promptly, it will be able to secure the necessary funds by 30 September 2022."

5. Cengiz advances two main arguments in support of its application for permission to appeal. First, it submits that the extension granted by the Court is excessively long and contributes to the deliberate delaying of payment by the Committee: it maintains that the Committee is now in a position to pay the debt but intends to delay as long as possible and that the Court's order extending time for payment precludes earlier enforcement action. Secondly, it submits that the Court did not take into account the financial difficulties of Cengiz itself, which have been caused by the long-term

nonfulfilment of obligations by the Committee. It contends that in all the circumstances a fair and reasonable deadline for postponing the payment of the debt "could be June 30, 2022 or earlier" and that this time would allow the Committee to fulfil its obligations by paying.

6. Thus, the principle of an extension of time for payment is not now in issue. The only issue raised on this application concerns the date to which the extension should have been granted. As to that, the judge had to form a view on the material before him, balancing the competing considerations and exercising his discretion accordingly. Far from leaving matters out of account, he made clear that he had carefully considered the submissions of both parties. Notwithstanding the arguments advanced by Cengiz, it cannot be said that the judgment he made was an unreasonable one or that the decision was otherwise wrong. It is not contended that there was any procedural or other irregularity in the proceedings. In the circumstances there is no real prospect of success on an appeal; nor do the matters advanced provide any other compelling reason why an appeal should be heard.

7. Accordingly, the conditions for the grant of permission to appeal are not met and the application for permission must be refused.

8. It should be noted that the terms of the order of 28 April 2022 require payment *on or before* 30 September 2022; and on the information provided to the Court by the Committee it appears likely that payment will be made in practice at about the end of June 2022. There is, however, no basis for intervention by the Court to *require* payment to be made at an earlier date than 30 September 2022.

Representation:

The Appellant was represented by Mr. Daniyaz Yensibayev, Law Lab.

The Respondent was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

10 June 2022

CASE No: AIFC-C/CFI/2022/0013

KAZTRADELOGISTICA LLP

Claimant

and

GRAIN KZ & KZ LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Lord Faulks QC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 23 May 2022 the Claimant seeks an Order from this Court to enforce the measures set forth in section 6 of the Arbitration Award dated 5 May 2022 made by Ms. Shakharman Issenova, the sole arbitrator appointed by a letter dated 7 April 2022 of Ms. Barbara Dohmann QC, the Chairman of the International Arbitration Centre of Kazakhstan, in Case IAC Arbitration No. 6/2022.

2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

   That Grain KZ & KZ LLP pay to KazTradeLogistica LLP:

   (1) in the amount of 1,305,000 (one million three hundred and five thousand) tenge,

   (2) the arbitrator's fee in the amount of 130,000 (one hundred thirty thousand) tenge, this being a total amount due at 1,435,000 (one million four hundred thirty five thousand) tenge.

   By no later than 6pm Nur-Sultan time on Friday 1 July 2022, being 21 days from the date of this Judgment and Order.

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

By the Court,

Representation:

The Claimant was represented by Ms. Lazzat Sagindikova, Benefits & Partners law company, Nur-Sultan, Republic of Kazakhstan.

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

CASE No: AIFC-C/CFI/2022/0012

AND IN THE MATTER OF AN APPLICATION TO SET ASIDE AN AWARD DATED 18 FEBRUARY 2022 MADE IN IAC ARBITRATION No 81/2021 under the IAC Arbitration and Mediation Rules 2018

BETWEEN:

AKSAYSTROY-2020 LLP

Claimant

v

METALLINVESTATYRAU LLP

Defendant

JUDGMENT

Dated 29 July 2022

Chief Justice of the Court:

The Rt. Hon. The Lord Mance

Introduction

1. There is before the Astana International Financial Centre Court ("the AIFC Court") an application by Aksaystroy-2020 LLP ("Aksaystroy") to set aside a final award dated 18 February 2022 made in Arbitration No 81/2021 in the International Arbitration Centre ("IAC") of the AIFC by Arbitrator Indira Yeleusizova. By her Award, the arbitrator awarded the claimant in the arbitration, MetallInvest LLP ("MetallInvest"), 17,807,787 tenge as the price of metal purchased by the respondent in the arbitration, Aksaystroy, together with 3,739,635 tenge by way of interest and 580,948 tenge by way of expenses. The application is made under Article 44(2)(a)(iii) of the AIFC Arbitration Regulations 2017 on the ground, in summary, that the arbitrator exceeded her jurisdiction. The application was listed for hearing and was heard before me at an in person hearing in the AIFC Court in Nur-Sultan on 13 June 2022.

2. MetallInvest's claim to the said price was made in respect of three consignments or batches of metal allegedly delivered under a Delivery Agreement No AKTYU-288 dated 6 August 2021, amended and supplemented by an Additional Agreement dated 28 August 2021 and an Appendix containing Specification No 3 also dated 28 August 2021 (replacing two previous Specifications). All three of these contractual documents give as the Parties' legal addresses: in the case of Aksaystroy, an address in Atkobe; and, in the case of MetallInvest, an address in Atyrau. But they all also go on to specify as the address for transfer of the goods a MetallInvest warehouse at 105 Pozharsky Street, Aktobe.

3. Clause 9.1 of the Delivery Agreement provides for all disputes or disagreements arising between the Parties under the Agreement or in connection with it to be "resolved in the International Arbitration for the West Kazakhstan held at the site of the International Arbitration Centre of the Astana International Financial Center Nur-Sultan …. (hereinafter referred to as the IAC AIFC), in accordance with the Rules of Arbitration and Mediation of the IAC AIFC" by "one presiding arbitrator Indira Yeleusizova", and the Parties in clause 9.2 confirmed that "they have read and agree with the Arbitration Rules of West Kazakhstan and the IAC AIFC". On this basis MetallInvest commenced Arbitration No 81/2021 claiming the price of the three batches of metal as due, together with interest and expenses.

4. During the Arbitration, no challenge was made to the arbitrator's jurisdiction or the way in which she was exercising it. The present application is, however, made on the basis that, in the award which she issued at the conclusion of the arbitration, she, in some way, exceeded her jurisdiction. Aksaystroy's application form specifically relies in this connection on and quotes Article 44(2)(a)(iii) of the AIFC Arbitration Regulations 2017.

Under Article 44(2)(a)(iii):

> "An arbitral award may be set aside by the AIFC Court only if: (a) The party making the application furnishes proof that:
>
> ……
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; ….."

It is not suggested that any other of the grounds in Article 44 on which an application may be made to set aside an IAC award has any relevance in this case.

The circumstances and Award in greater detail

5. The following matters are shown by the award and the application form and annexed documents, as well as various further documents produced by the parties after the oral hearing. It appears that Aksaystroy needed metal for construction of an apartment block in the city of Uralsk. MetallInvest's case, reflected in a letter No 228 dated 25 October 2021 to Aksaystroy, was and is that it delivered the relevant three batches of metal when they were shipped at and from its Aktobe warehouse to Aksaystroy's premises in the city of Uralsk in accordance with three goods issue slips, no 22420 dated 7 August 2021, no 28073 dated 28 August 2021 and no 28083 dated 28 August 2021. At the foot of each of the three goods issue slips, as translated, appear the words "Handed over the item Butko O.V.", followed by a note stating that the original slip caries a signature purporting to be by Mr Bikmukhambetov R.R. Mr Butko O.V. is identified as the Head of MetallInvest's

Aktobe warehouse in documents relating to the consignment of the goods produced after the hearing by MetallInvest. Mr Bikmukhambetov R.R. was treated in the arbitration as the registered recipient of a power of attorney issued by Aksaystroy, entitling him to sign accepting receipt of good on behalf of Aksaystroy. (The Ministry of Finance Register for the period ended 20 October 2021 produced with Aksaystroy's application evidences this only for the period 6 August 2021 to 18 August 2021, but nothing appears to have been made of this, presumably on the basis that his authority was or may well have been renewed and extended.) MetallInvest evidently relied in support of its claim in the arbitration on the goods issue slips, on a Reconciliation Act and Letter of Guarantee No 279 dated 27 July 2021 signed by Aksaystroy undertaking to pay the price by 12 February 2022, on electronic invoices submitted by MetallInvest dated 7 August 2021, on Specification No 3 dated 28 August 2021 signed by both Parties and on subsequent reminders to Aksaystroy about non-payment, which were not rejected by Aksaystroy. Subsequent to the oral hearing, it has also produced various further consignment documents which it says were also before the arbitrator.

6. In the above circumstances, MetallInvest initiated the present arbitration on 10 October 2021, claiming the price of the three batches. The award indicates clear that Aksaystroy sought to resist the claim before the arbitrator by reference to a number of points:

    a. The initiation of the arbitration proceedings was premature, in the light of the Letter of Guarantee undertaking to pay the price by February 2022.
    b. The consignments had been stolen by a group of persons.
    c. A criminal case had been initiated in the city of Uralsk, a "circle" of suspects had already been established, from whom initial statements had been taken, and the police were establishing the current location of the stolen goods.
    d. The authenticity of Mr Bikmukhambetov's purported signatures on behalf of Aksaystroy was in doubt.
    e. MetallInvest should be required to provide waybills covering the consignments, under paragraph 12 of the Order of the Minister for Investment and Development of the Republic of Kazakhstan dated 30 April 2015 No 546 "On Approval of the Rules for the Transportation of Goods".

f. Aksaystroy signed the Reconciliation Act, Specification No 3 and Letter of Guarantee and acted thereafter in the belief that the goods would be or had been delivered, and not by way of confirmation of delivery.

7. The award makes clear that the arbitrator did not consider the arbitration proceedings premature. She pointed out (in paragraph 17 of the Award) that clause 4.1 of the Delivery Agreement required Aksaystroy to pay MetallInvest 100% of the price no later than 30 days after signature by Aksaystroy or its authorized agent of the relevant Specification or invoice for the relevant consignment, if not otherwise provided by the parties in the Specification or additional agreement, and that under Specification No 3 dated 28 August 2021 the deadline for payment was set as no later than 10 September 2021.

8. As to the remaining points raised by Aksaystroy in its defence, the arbitrator was evidently satisfied on the material put before her that delivery had been effected by MetallInvest in the city of Aktobe, with shipment and acceptance of the goods taking place likewise in the city of Aktobe. The criminal proceedings had, on the other hand, been initiated in the city of Uralsk "on the basis of a report about a shortage of inventory for a large sum for the construction of multi-apartment buildings at Uralsk" (paragraph 34). In effect, any shortage or loss by abstraction had occurred subsequent to delivery to Aksaystroy at MetallInvest's Aktobe warehouse, and any criminal investigation into it was, on that basis, irrelevant. Delivery having been made, she accordingly held the price to be payable.

The issues before the AIFC Court

9. Before the AIFC Court three issues were raised:
    a. Whether the legal representatives of Aksaystroy were properly authorized to appear and to represent Aksaystroy at the hearing before me on 13th June 2022.
    b. Whether the application to set aside was issued within the three month period referred to in Article 44(3) of the AIFC Arbitration Regulations 2017.
    c. Whether the application to set aside was made good as a matter of substance.

The first two points are new points which are, by their nature, independent of the third.

10. MetallInvest, in raising point a) before the AIFC Court, relies on Aksaystroy's failure to produce a certificate attesting to the authority of those purporting to represent it before

the AIFC Court. Asked by the Court what basis there was for suggesting that such a certificate is necessary before the AIFC Court, MetallInvest's response was that a certificate is required under the legislation of Kazakhstan, and that this is applicable under clause 12.5 of the Delivery Agreement, as recorded by the arbitrator in paragraph 24 of her Award. Clause 12.5 provides:

> "The terms, other rights, obligations and responsibilities of the Parties that are not reflected in this Agreement are regulated in accordance with the requirements of the current legislation of the Republic of Kazakhstan."

11. Clause 12.5 addresses the law governing substantive issues arising under the Delivery Agreement. Whether a certificate is required for appearance before the AIFC Court is not such a substantive issue. It is, like other procedural issues relating to any dispute, an issue subject to the law governing the dispute resolution provisions contained in Clause 9.1 and 9.2. Article 7.2 of the IAC Arbitration Rules states: "An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract". An arbitration agreement is therefore treated as independent of, and will not infrequently be subject to a different law to that governing substantive issues arising under, the main contract. That is so here, where the Agreement provides for arbitration under the Arbitration Rules of the IAC AIFC. The intended effect is clearly that the arbitral law of the AIFC shall apply. There is under AIFC Court law no requirement for any such certificate as suggested by MetallInvest. All that is required of any lawyer appearing for a client before the AIFC Court is that she or he be (i) licensed by the AIFC Court to so appear and (ii) authorized to so appear by their client. The existence of authority is here not challenged, and would normally be presumed from the fact of appearance. It would be a serious breach of professional duty for a lawyer to appear to represent a client, without having authority to do so. It follows in the present case that point (a) raised by MetallInvest fails, and must be dismissed.

12. Point (b), again raised by MetallInvest, is that Aksaystroy's application to set aside is out of time under Article 44(3), which reads:

"An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or such longer period as the parties to the arbitration have agreed in writing ……" There is no suggestion here of any longer period than three months being agreed between the parties. MetallInvest raised point b) on the basis that the relevant start date was 23 December 2021. That is however merely the date on which Justice Tom Montagu-Smith QC in AIFC Court Case No 13 of 2021 upheld a grant by the arbitrator of interim (freezing order) relief. For the purposes of an application to set aside an award under Article 44(3), the relevant date is however "the date on which [Aksaystroy] received the award". The relevant award is here dated 18 February 2022, but it appears from the court file that it was only sent to the Parties by email by the arbitrator on 21 February 2022. Accordingly, Aksaystroy had until 21 May 2022 to apply under Article 44(3). But even if 18 February 2022 was the relevant date, Aksaystroy had until 18 May 2022. Either way, the present application dated 18 May 2022 is in time. It is in the circumstances unnecessary to consider whether there may be any basis on which the AIFC Court might be able to extend the three month period in Article 44(3). It follows from the above that point b) also fails and must be dismissed.

13. Point (c) therefore arises. Aksaystroy's application introduces this point with the statement that "The Claimant does not agree with the arbitrator's decision of 18.02.22 …. on the following grounds: …..". Similarly, in a written submission filed after the oral hearing, Aksaystroy submits that any conclusion that there had been proper delivery of the goods is "fundamentally wrong". These are unpromising starts to a submission that the arbitrator exceeded her jurisdiction. A challenge to an arbitrator's jurisdiction involves showing that the arbitrator decided some matter outside the scope of the matters submitted to her. An assertion that a party "disagrees" with the arbitrator's decision or that she reached a "wrong" conclusion goes nowhere towards showing that she exceeded her jurisdiction. A losing party in arbitration not infrequently disagrees with the award or with issues decided in it. But that says nothing about the arbitrator's jurisdiction.

14. The question under Article 44(2)(a)(iii) is not, therefore, whether a party complaining agrees or disagrees with the award or views it as "wrong". It is equally not whether the Court itself agrees or disagrees with the award or regards it as "right" or "wrong". It is one of the basic features of most commercial arbitration that arbitration awards are generally final and non-appealable (or "non-reviewable") on their factual or legal merits. This is a feature often viewed by commercial parties - at least until they lose - as an advantage of arbitration. Parties who agree to arbitration need to be aware of this principle of finality or non-reviewability. They need to be clear before agreeing to any arbitration agreement that this is what they want – and also that this is what they will have to accept if they lose for reasons with which they do not agree. Court proceedings are different, because court procedures generally enable at least one appeal on factual or legal issues, subject to any requirement for permission to ensure some minimal prospect of success.

This is what the AIFC Court, by its appeal system, allows for proceedings initiated before it (whether initiated within its exclusive jurisdiction or by agreement or under a choice of AIFC Court clause): see Part 5 of the AIFC Court Regulations and Part 29 of the Rules of the AIFC Court. If a party wishes to reserve a possibility of reviewing the rights or wrongs of a first instance decision, it may always prefer or seek to negotiate a choice of court clause as an alternative to an arbitration clause.

15. What is within an arbitrator's jurisdiction depends upon a consideration of the scope of the issue(s) submitted to arbitration. Here, the essential issue submitted was whether due delivery had been made, rendering price due under a contract for supply of metal goods. The short answer to the present application is, for reasons elaborated in greater detail below, that the arbitrator found that due delivery had been made and that the price was due; and that her decision, whether right or wrong, was in respect of issues which were submitted to her to decide, and so fell within her jurisdiction.

16. The (sole) ground for setting aside the award on which Aksaystroy relies is, as stated, excess of jurisdiction. There are in Article 44(2) and (3) of the Arbitration Regulations some other, limited grounds (modelled on those found in the New York Convention 1958) on which the Court has power to set aside an arbitration award. But all these grounds are strictly limited and none of them enables the Court to review the merits of an arbitrator's

award or decision on substantive issues, whether of fact or law, made within her or his jurisdiction.

17. Aksaystroy has not by its written or oral submissions shown any grounds for considering that arbitrator Yeleusizova acted in any respect in excess of her jurisdiction. For the most part, the grounds invoked by Aksaystroy involve recitation of matters which the arbitrator addressed in her award, coupled with reasons given for disagreeing with her. As already explained, such grounds do not go to jurisdiction. They simply challenge the arbitrator's decision on matters within her jurisdiction. To repeat, even if the Court were to conclude that the arbitrator appeared to have been wrong in the way she viewed or decided particular matters or the claim as a whole, that would be irrelevant. The question under Article 44(2) is not whether she was right or wrong, but whether her decision observed the limits on her jurisdiction. Courts as well as arbitrators do from time to time err in their reasoning and decisions in the course of exercising their jurisdiction. The only remedy for error as such is, where available, an appeal, but, as has been pointed out, arbitration does not generally offer that remedy.

18. Aksaystroy also describes the arbitrator's conclusion that delivery was made in Aktobe as a complete and unfounded contradiction, based on a failure to familiarize herself with the letter No 228 of 25th October 2021. This letter recorded that MetallInvest "had shipped metal" under the Agreement "to your facility in the city of Uralsk". Several points may be made about Aksaystroy's reference to the letter of 25th October 2021. First, where delivery was to be made depends on the contractual documentation, not on a letter written some months later. Second, and in any event, the letter is not in the Court's view inconsistent with the arbitrator's conclusion that delivery was made in Aktobe. Third, even if the Court were, in the light of the letter or the contractual documentation, to disagree with the arbitrator's decision, that would not mean that she exceeded her jurisdiction. Fourth, the Court in fact sees no reason to disagree with the arbitrator's conclusion that, under the relevant contractual provisions, the consignments were to be accepted and delivered at MetallInvest's warehouse in the city of Atyrau, not in the city of Uralsk (although that is clearly the place to which they were destined to be carried after acceptance and delivery and at which they were evidently to be used by Aksaystroy in a

building construction project). Acceptance and delivery refer, in the context of the present contract between MetallInvest and Aksaystroy, to the point at which the possession of, and the risk of loss of or damage to, the goods were, under the contract, to pass from MetallInvest as supplier to Aksaystroy as buyer.

19. In this connection, the Delivery Agreement provides expressly:

"QUANTITY AND QUALITY OF GOODS

…..

2.2. Acceptance by the Buyer of the Goods in terms of quantity and quality is carried out at the Supplier's warehouse, the address of which is specified in this Agreement.

…..

DELIVERY OF THE GOODS

5.1. The Goods are delivered from the Supplier's warehouse, within the terms agreed by the Parties in the Specifications, invoices, or invoices and invoices for the corresponding Goods. The Supplier is obliged to notify the Buyer of the readiness of the Goods for shipment no more than 3 (three) working days before the date of shipment.

….

5.3. The Goods are delivered on the terms of its pickup by the Buyer from the Supplier's warehouse, unless otherwise provided by the Parties in the Specification.

….

5.8. Together with the delivered Goods, the Supplier is obliged to transfer to the Buyer the following documents related to the shipment:

- Supplier's invoice;
- bill of lading;
- a copy of the quality certificate or other similar document, certified by the seal of the Supplier;
- certificate of work performed – in case the Supplier provides the Buyer with services for cutting, delivery of Goods to the Buyer, etc. ….

….

5.10. Acceptance of the Goods is carried out by the Buyer's representative acting on the basis of the relevant power of attorney from the Buyer. The signing by the Buyer's representative of an invoice for the corresponding Product means that the Buyer accepts this Product from the Supplier in terms of quantity and quality, and there are no claims against the Supplier regarding obvious defects of the Product.".

20. Further, as noted in paragraph 2 above, all three contractual documents, the Delivery Agreement dated 6 August 2021 and the Additional agreement No 1 and Specification No 3 specify as the address for transfer of the goods MetallInvest's warehouse at 105 Pozharsky Street, Aktobe. In addition, Specification No 3 states: "Place of acceptance of the Goods: the Supplier's warehouse at the address of Aktober, Pozharsky Street 105A".

21. Far from the arbitrator misreading the letter dated 25 October 2021, the Court considers it to reflect the contractual position, under which delivery of consignments was to be made on their collection and shipment from MetallInvest's Aktobe Goods transfer warehouse, as defined in the contractual documentation. The information given in the letter that MetallInvest "had shipped metal" under the Agreement "to your facility in the city of Uralsk" is in the Court's view entirely consistent with delivery occurring, as the Agreement provides, on shipment from the warehouse. Looking at the documents produced to the Court with the application and following the hearing, the delivery which the arbitrator found to have occurred evidently involved a Mr Butko O.V., as head of MetallInvest's Goods transfer warehouse, and Mr Bikmukhambetov R.R. accepting the goods for Aksaystroy. That was, as stated, a conclusion on a matter that was clearly and directly within the arbitrator's jurisdiction. Aksaystroy's objection to its correctness gives no basis now to challenge it before the Court.

22. Aksaystroy relies on a number of further points, all associated with the question whether delivery was actually made. It refers to the alleged theft, giving rise to the criminal case initiated in Uralsk on 2 November 2021, the establishment and initial interviewing of the circle of suspects, and the police measures to establish the location of the goods. It states that the Reconciliation Act and accounting documents were signed on trust that delivery would be or had been made. Elaborating on these points, Aksaystroy questions the very

delivery of the goods and the genuineness of the signatures attesting to its acceptance of the goods at the Aktobe warehouse. It states that Mr Bikmukhambetov "has shown that on all three bills of lading [a reference to the three goods issue slips] …. his signature as a trustee [i.e. holder of a power of attorney] of Aksaystroy … was forged, i.e. this person showed that he allegedly did not receive the goods ….", that this is now being checked and established by the investigating authorities, and that visual comparison alone of the purported signatures on the goods issue slips with the power of attorney make it "really clear to the naked eye that the signature was forged". Carrying this further, the application at its end also submits that the rendering of the arbitration award while police enquiries were proceeding amounted to "direct and illegal interference in the activities of the investigating police in the framework of the initiated criminal case".

23. None of the matters set out in the previous paragraph goes to the arbitrator's jurisdiction. On the contrary, most if not all appear to have been put before her in the course of her exercise of her jurisdiction. As a matter of fact, it is far from clear when and how Mr Bikmukhambetov is suggested to have "shown" that his signature was forged. Nothing by way of statement from him to that effect has been shown to the Court or is referred to by the arbitrator. Aksaystroy's submission before the arbitrator appears to have been that an obvious difference between the power of attorney specimen and the three signatures on the goods issue slips established "doubt" about the genuineness of the latter. Further, Aksaystroy's lawyers wrote to the criminal investigators in Uralsk on 16 June 2022 noting that Mr Bikmukhambetov was "recognised as a suspect" and requesting that he be asked whether he received the goods and confirms his signature on the goods issue slips. That suggests that he had not previously been approached or asked to do this. The investigators' response on 17 June 2022 was that he had been out of Kazakhstan, but that he had said that he would be back at the end of June 2022. In fact, he was evidently back by 24 June 2022, when he made a notarial statement for MetallInvest saying that he had not given any evidence in the criminal investigation about non-delivery of the goods, but had, on the contrary, confirmed his acceptance of the goods and the corresponding invoices at MetallInvest's Aktobe warehouse.

24. The previous paragraph includes matters which were not, and could not have been, before the arbitrator, and so are mentioned only for completeness, because they appear from documents put before the Court by the parties. So far as concerns the arbitrator and her jurisdiction to make her award, all that matters is that she was asked to determine whether the price was due as a result of due delivery of the goods and that is what she did. She was aware of the "doubt" suggested regarding the signatures on the goods issue slips, but this does not appear to have been supported by any document or by more than an assertion that the signatures differed from that on the Ministry of Finance record of powers of attorney. She was not given the benefit of the expert handwriting evidence which a tribunal would normally expect to be given in such circumstances. Lay assertions about the clarity "to the naked eye" of a forgery are not often very persuasive. Aksaystroy complains before this Court that the arbitrator should have given time or further opportunity to disprove the genuineness of Mr Bikmukhambetov's signature. But no formal request was made to the arbitrator by Aksaystroy to be given time to reinforce its case (or even it appears to await developments in the criminal proceedings). In any event, the arbitrator's decision to proceed to an award on the material before her was a decision reached in the exercise of her jurisdiction. None of the points raised in this area affects the arbitrator's jurisdiction or suggests any respect in which she exceeded it.

25. Aksaystroy's further suggestion that the arbitrator's making of her award amounted to "direct and illegal interference in the activities of the investigating police" has no force. She had before her a civil claim to the price, which depended on whether delivery had been made. An award in such a claim does not and cannot "interfere" with ongoing police or criminal activities or proceedings. The outcomes of a civil claim and a criminal investigation may of course prove to be or to point in different directions, and the arbitrator might, as a matter of discretion, have considered adjourning the arbitration proceedings to await developments in the criminal investigation. But she was not obliged to do this and did not exceed her jurisdiction by adjudicating on the civil claim which was before her. She was evidently satisfied that the claim was good - meaning that any shortage or abstraction occurred at a point after the acceptance and takeover of the goods by Aksaystroy at MetallInvest's warehouse, and that the Uralsk criminal investigation was thus concerned with alleged post-delivery loss either en route to or in Uralsk.

26. Aksaystroy also complains that it is not shown that the documentation referred to in clause 5.8 of the Delivery Agreement was issued on or against delivery. It further refers in this connection to paragraph 12 of the Rules for the Transportation of Goods by Road, approved by Order of the Minister for Investment and Development of the Republic of Kazakhstan dated 30 April 2015 No 546. According to such Rules (in a somewhat imperfect translation provided by Aksaystroy):

> "12. Transportation of goods is issued by waybills on paper or in the form of electronic digital document.
>
> The bill of lading is the main transportation document, according to which the consignor writes off the shipping cargo and capitalizes it by the consignee.
>
> 13. The consignor submits to the carrier a consignment note for the goods presented for transportation, drawn up in four copies if issued on paper.
>
> …..
>
> 15. Acceptance of goods for transportation from the consignor is certified by the signature of the carrier in all copies of the bill of lading in case of registration on paper.
>
> The first copy remains with the consignor and is intended for writing off the goods presented for transportation. The second, third and fourth copies are handed over by the consignor to the carrier.
>
> ….
>
> 19. The waybill of a motor vehicle is a primary accounting document, which, together with the consignment note, determines the indicators for accounting for the operation of the vehicle.
>
> ….
>
> Waybills of a motor vehicle and bills of lading, issued on paper, are subject to registration in the registers of the movement of waybills and waybills, and storage by the carrier together with the journals for 5 years.
>
> 20. Waybills and bills of lading are issued by the carrier on paper or in the form of an electronic digital document for one shift (flight) before the start of the shift
>
> (flight) separately for each freight vehicle ……"

27. In fact, the Court has before it from the original application signed goods issue slips dated 7 and 28 August 2021 for the three relevant batches, and MetallInvest has since the hearing also produced consignment documents, consisting of route sheets, customer coupons, consignment vouchers, transport documents, business trip instructions, certificates and travel expense documents as well as goods invoices, all of which it says were before the arbitrator. Even if there were any basis for considering that these documents did not strictly satisfy clause 5.8 of the Delivery Agreement or Kazakh Rules for the Transportation of Goods by Road (and the Court does not see any), that would be, at most, a matter for the arbitrator to consider, when exercising her jurisdiction, not a matter capable of going to her jurisdiction. The Court would only add that, if, as the arbitrator found, the goods were actually delivered by MetallInvest to Aksaystroy, it is difficult to see how or why any non-compliance with either the contractual provisions regarding delivery of bills of lading or the provisions of the ministerial Rules for the Transportation of Goods by Road could deprive MetallInvest of its right to the invoice price.

28. Although the Court has sought to some extent to analyse as well as identify the substantive points which arose in the arbitration and which are very largely sought to be raised again in and by Aksaystroy's application, the reality at the end of the day is that the arbitrator found that delivery had been affected and the price was due. There is nothing to mean or show that she exceeded her jurisdiction either in, or in the course of reaching, that conclusion. There may have been matters she might further have explored or elucidated, or further matters which might have been argued before her, but that is not to the point. The Court repeats and underlines that, where parties agree on arbitration, the Court does not have an appellate role. The grounds for intervention provided by Article 44(2) and (3) are modelled on the New York Convention and are deliberately confined.

The Court's only, limited, task is, in the present case, to determine whether the arbitrator's award "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration". Here, whatever criticisms might be addressed to its substance, and many have been suggested and some of them analysed in this judgment, the position at the end of the day is that the arbitrator's award dated 18 February 2022 was concerned with and

dealt with the disputed claim that due delivery had been made and that the price was accordingly due. It did not deal with any matters outside the scope of that issue.

29. The claim by Aksaystroy-2020 LLP to set aside the final award of Arbitrator Yeleusizova Indira dated 18 February 2022 therefore fails and is dismissed. Costs must follow the event, unless cause to the contrary is shown by written submissions to be lodged with the Court within ten days after the date of this judgment.

By Order of the Court,

The Rt. Hon. The Lord Mance
The Chief Justice of the AIFC Court,
29 July 2022

Representation:

The Claimant was represented by Mr. Ruslan Kenzhegaliyev, lawyer, Aksaystroy – 2020 LLP.

The Defendant was represented by Mr. Rakhat Azhgaliyev, lawyer, MetallInvestAtyrau LLP.

IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

27 June 2022

CASE No: AIFC-C/CA/2022/0011

Ministry of Healthcare of the Republic of Kazakhstan

Appellant

v

Success K Limited Liability Partnership

Respondent

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

1. **An extension of time for filing the application for permission to appeal is granted.**

2. **The application for permission to appeal is refused.**

JUDGMENT

1. By a judgment dated 24 January 2022 in Case No. AIFC-C/CFI/2021/0008 the Court of First Instance of the Astana International Financial Centre ("the AIFC") decided two applications relating to a Final Award dated 4 October 2021 made in Arbitration No. 2/2021 in the International Arbitration Centre of the AIFC. By that Award the arbitral tribunal awarded the claimant in the arbitration, Success K LLP ("Success"), substantial sums claimed against the Ministry of Healthcare of the Republic of Kazakhstan ("the Ministry") by way of debt and contractual penalty under a Contract made between the parties for the provision of consultancy services by Success to the Ministry. The two applications before the Court, described as being in substance mirror images of each other, were (1) an application by Success seeking recognition and enforcement of the Award, and (2) an application by the Ministry seeking to have the Award cancelled or set aside and refusal of its recognition and enforcement on the ground that the arbitration agreement was invalid under the law of the Republic of Kazakhstan. For reasons given in the judgment, the Court ordered that Success's application be granted and that the Ministry's application be dismissed.

2. The Ministry now applies to the Court of Appeal of the AIFC for (a) an extension of time for filing an application for permission to appeal from that decision; (b) permission to appeal; and (c) further relief consequent upon the grant of such permission and upon success in any resulting appeal.

Extension of time

3. By Rule 29.8(2) of the AIFC Court Rules, an appellant's application for permission to appeal from a decision of a lower Court may be made to the appeal Court in an appellant's notice. By Rule 29.10(2), in a case where no direction as to time has been made by the lower Court, the appellant must file the appellant's notice within 21 days after the date of the decision of the lower Court. Rule 29.12 provides that where the time for appeal has expired, the appellant must file the appellant's notice and includ e in it (1) an application for an extension of time, and (2) a statement of the reason for the delay and the steps taken prior to the application being made. Further provisions relating to an appellant's notice are contained in Rules 29.23 to 29.27. No separate form of appellant's notice has been prescribed for use in the Court. The standard claim/application form must be used for the purpose.

4. The time for filing an appellant's notice in respect of the decision dated 24 January 2022 expired on 14 February 2022.

5. Under cover of a letter dated 15 February 2022, one day after the expiry of the time limit, the Ministry sent a "Statement for permission to appeal" against the decision of 24 January 2022. The Statement contained grounds of appeal materially identical to those eventually included in a duly completed claim/application form issued on 18 May 2022 (see below). But it had numerous deficiencies, in addition to its lateness: (i) it gave no reason for the failure to comply with the time limit (nor has any

reason been offered subsequently); (ii) it was not in the proper form; (iii) it was only in the Russian language, with no English translation as is required by Rule 2.3 and is made clear on the face of the proper form; and (iv) it was sent not to the AIFC Court Registry but to the AIFC Authority, which forwarded it promptly to the Registry. On the same day, 15 February, the Registry contacted the Ministry to inform it that it must communicate directly with the Registry on case matters, to confirm relevant contact details and to request it to send the letter to the Registry via email in the English language. The letter was received by the Registry via email in the English language on 18 February. On 21 February the Registry sent a claim/application form to the Ministry and asked the Ministry to complete the form and file it properly with the Registry. According to information provided by the Registry, there were then various communications between the Ministry (which had personnel changes) and the Registry until the application form was formally sent to the Registry on 11 May before being stamped and registered by the Registry on 18 May. According to the Ministry, the completed application form was sent via email at the beginning of March but correspondence and negotiations were subsequently conducted to bring the text into line and translate it. Nothing turns on any slight difference between those accounts.

6. That is a regrettable history of delay, stemming from an initial failure to comply with the relevant Rules. The AIFC Court Rules underpin the administration of justice by the Court and a failure to comply with them will not readily be condoned. I bear in mind, however, that the Court's procedures, including the appeals procedures in particular, are still relatively unfamiliar to many litigants and that the Ministry's delay in producing a completed application in the proper form may be attributable in part to such unfamiliarity. Moreover, an important consideration is that the substance of the Ministry's grounds was advanced at an early stage in the initial Statement – just a day (in the Russian version) or four days (in the English translation) after the expiry of the time limit. A further consideration is that the delay does not appear to have caused any prejudice to Success: none is alleged in Success's written objection to the grant of an extension of time, and this Court's understanding is that the monies due to Success under the Final Award have been paid in full by the Ministry.

7. Taking everything into account and in the exercise of judicial discretion, I have come to the conclusion that the Ministry should be granted the required extension of time. It follows that the Ministry's substantive application for permission to appeal falls to be considered by the Court, and I therefore turn to assess that application.

The application for permission to appeal

8. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.

9. The Ministry's application for permission to appeal advances five substantive grounds, which may be summarised as follows:

(1) alleged failure by the arbitral tribunal and the Court of First Instance to take into account and give a legal assessment of the consequences, under the applicable law (namely the law of the Republic of Kazakhstan) of the impossibility of performance of contractual obligations and of circumstances of force majeure;

(2) an argument that, having regard to the impossibility of fulfilment of obligations under the
Contract, the Ministry sent a lawful notice of termination on 14 August 2020 and that the Contract therefore expired on that date;

(3) alleged failure of the Court of First Instance to take into account that the Ministry acknowledged performance of the contractual obligations but considered that they were not performed qualitatively, and a contention that the Court was not qualified to assess the quality of services rendered;

(4) an argument that the acts of services rendered under the Contract were signed by persons not authorised to do so and could not be evidence of proper performance of the contractual obligations; and

(5) arguments that Success performed the Contract in violation of its terms; that the expiration of the term of the Contract entailed the termination of the obligations of the parties; that the Ministry, on the basis of reports provided by Success, had determined that there was no basis for payment for services rendered prior to the date of termination; and that the obligations of the Ministry to sign acts of completed works were terminated.

10. Those grounds face fundamental difficulties.

11. First, they do not address the issues that were before the Court of First Instance and were the subject of the decision that the Ministry seeks to appeal. As already indicated, the Ministry's case before that Court was that the arbitration agreement was invalid because it was concluded in violation of the law of the Republic of Kazakhstan without obtaining the consent of the state body responsible for state property. That case was rejected for the detailed reasons given in the Court's judgment, addressing both the primary way in which the case had been put by the Ministry and an alternative or additional submission understood to be advanced in the application to the Court. The grounds set out in the application for permission to appeal do not touch on those reasons. They raise matters that were not raised before the Court, either by the Ministry's own application seeking to have the Final Award cancelled or set aside or by Success's application for recognition and enforcement of the Award. They provide no basis for doubting the correctness of the Court's decision on the issues before it.

12. Secondly, the matters raised in the grounds would not have provided a proper basis of challenge to the Final Award even if they had been raised before the Court of First Instance. They relate to the substantive merits of the Ministry's case before the arbitral tribunal. As such, they fall outside the limited grounds on which the Award could be challenged in court.

13. Regulation 44 of the AIFC Arbitration Regulations (as adopted by resolution of the AIFC Management Council dated 5 December 2017) provides:

> "**Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a court against an arbitral award made in the seat of the AIFC may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) Such application may only be made to the AIFC Court. An arbitral award may be set aside by the AIFC Court only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication, under the law of the AIFC;
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or the tribunal proceedings or was otherwise unable to present his case;
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration …
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties …
>
> (b) the AIFC Court finds that:
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under AIFC law; or
>
> (ii) the award is in conflict with the public policy of the Republic of Kazakhstan.
>
> (3) …."

14. Regulation 47 contains parallel provisions as to the grounds for refusing recognition or enforcement of an arbitral award.

15. The applications decided by the Court of First Instance concerned the validity of the arbitration agreement, an issue falling within Regulation 44(2)(a)(i) and the parallel provision of Regulation 47(1)(a)(i). By contrast, the grounds of the application for permission to appeal do not relate to the

validity of the arbitration agreement or to any of the other bases on which an arbitral award may be set aside or its recognition and enforcement may be refused.

16. For all those reasons an appeal against the decision of the Court of First Instance would have no real prospect of success. Nor is there any other compelling reason why an appeal should be heard.

17. The application for permission to appeal must therefore be refused. In those circumstances the further relief sought in the application does not arise for consideration.

Representation:

The Appellant was represented by Mr. Zhasulan Abulkhairov

The Respondent was represented by Mr. Yerbolat Khassanov, SNK Responsa.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

4 May 2022

CASE No: AIFC-C/CFI/2022/0010

ERG RECYCLING LLP

Claimant

and

DA CHEN LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice The Rt. Hon. The Lord Faulks QC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 28 April 2022 the Claimant seeks an Order from this Court to enforce the measures set forth in Part 4 «Resolution Part of the Award» of the Final Arbitration Award dated 5 April 2022 made by Ms. Yelena Nesterova, the sole arbitrator appointed by a letter dated 3 September 2021 of Ms. Barbara Dohmann QC, the Chairman of the International Arbitration Centre of the AIFC in Kazakhstan, in Case IAC Arbitration No 5/2021.

2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

   That Da Chen LLP pay to ERG Recycling LLP:

   (1) a penalty in the amount of 613,878,697.55 (six hundred and thirteen million eight hundred and seventy-eight thousand six hundred and ninety-seven KZT, 55 tiyn);

   (2) arbitration costs in the amount of 6,373,363.52 (six million three hundred and seventy-three thousand three hundred and sixty-three KZT, 52 tiyn).

   By no later than 6pm Nur-Sultan time on Wednesday 18 May 2022, being 14 days from the date of this Judgment and Order.

3. The Defendant is given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By the Court,

Representation:

The Claimant was represented by Mr. Ruslan Sadrtdinov, ERG Recycling LLP

The Defendant was represented by Ms. Karlygash Nurpisova, Deheng Law Offices LLP

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

6 May 2022

CASE No: AIFC-C/CFI/2022/0009

ARMAN KUATOV

Claimant

v

PRIVATE COMPANY SERGEK DEVELOPMENT LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The application for permission to appeal is refused.

JUDGMENT

1. By an order and judgment dated 14 March 2022 in Case No. AIFC-C/SCC/2021/010 the AIFC Small Claims Court (Justice Patricia Edwards) dismissed a claim by Arman Kuatov relating to an Employment Agreement between him and the defendant, Private Company Sergek Development Ltd.

2. By an application form dated 5 April 2022 the claimant applied to the AIFC Court of First Instance for permission to appeal that decision. Short written submissions in opposition to the application were filed by the defendant.

3. The claimant has asked that the application be determined on paper. I am satisfied that there is no need for an oral hearing (see Rule 29.17 of the AIFC Court Rules).

4. Rule 29.6 of the AIFC Court Rules provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.

5. The claimant's case on the present application is limited to the contention that the decision of the lower Court was wrong on one issue, concerning the termination of the Employment Agreement, which was dealt with at §§37-45 of the Court's judgment. No complaint is made about the conclusions reached on the other issues considered in the judgment or about any procedural matters.

6. With regard to the termination issue the judge recorded that the claimant sought an order requiring the defendant to terminate the Employment Agreement (§37). She found that the effect of clause 2 of the Agreement was that the Agreement was concluded initially for one year of work, commencing on 12 June 2020, but was automatically extended for a further year as neither party had sent a notification of termination before the end of the first year (§§38-39). She noted that the contract

might terminate before the expiry of that period if either party chose to terminate following a material breach by the other, but that had not happened (§40). None of that is the subject of criticism by the claimant.

7. At §41 the judge referred to a letter of 23 July 2021 in which the claimant said to the defendant: "*I ask you to terminate the employment contract with me on my initiative on July 23, 2021 …*". She said that it was not entirely clear on what basis the claimant sought to terminate. Clause 10.4 of the Agreement provided: "*In the event of termination of this Agreement on its own initiative the Employee shall be obliged to notify the Employer in writing not later that 1 (one) calendar month in advance, and during this period, the Employee shall: reimburse losses, if they were caused to the Employer by the Employee; pay all kinds of debts to the Employer; finish the work started*". The judge observed that the claimant did not give a month's notice nor was there any suggestion of doing any of the things listed in the clause (§42).

8. In his application for permission to appeal the claimant argues that the basis of termination was clear, that prior to the letter of 23 July 2021 he had ascertained that none of the obligations listed in clause 10.4 was outstanding on his side, and that he therefore asked to terminate the contract without a delay of one calendar month; and he says that in any event the month required by clause 10.4 had long passed by the time of the proceedings, yet the defendant did not declare any outstanding debts and at the same time did not terminate the Agreement. In my view, however, there is no arguable error in the judge's reasoning and she was plainly correct to find in the circumstances that the letter of 23 July 2021 was not effective to terminate the Agreement.

9. At §43 the judge stated that, alternatively, the parties could agree earlier termination and that this was what the claimant appeared to be contemplating by his letter of 23 July 2021 and a follow-up letter of 4 October 2021. Termination by agreement was addressed in clause 10.5 which provided that the party who wished to terminate was to send a notice to the other, who "*shall be obliged to inform the other Party about the decision made in writing within three working days*", and that "*The date of termination of the Employment Agreement by agreement of the parties shall be determined by agreement between the Employee and the Employer*". Although the defendant did not respond to the claimant's first request, it could have simply declined (i.e., as I read the judgment, it could have responded with a simple refusal to terminate). The defendant did eventually respond on 12 October 2021, stating that the claimant needed to come to work and give explanations to the defendant about the situation. The judge described this as a request to the claimant to meet to discuss possible

termination. She went on to say that the claimant did not do so but proceeded to commence the litigation; no agreement to terminate was reached.

10. In his application for permission to appeal the claimant says that his letters were directed at termination on his initiative pursuant to clause 10.4, not termination by agreement pursuant to clause 10.5. In relation to clause 10.5 he argues in any event that the defendant could not simply decline the claimant's request and that the defendant's response of 12 October still violated the requirements of the clause. The claimant also states that his performance under the contract was on a remote basis, and he takes issue with the defendant's insistence that he should come to the office to give explanations in person with regard to the request to terminate. As a reason for his refusal to meet at the office, he says that on arrival at the office he would be subjected to moral or physical pressure and that he would be threatened (a suggestion strongly disputed by the defendant). None of the claimant's arguments, however, meet the essential point in the judge's reasoning that the parties did not in the circumstances reach an agreement to terminate; and the judge's conclusion on that point does not appear to me to be arguably wrong.

11. At §44 the judge stated that accordingly the Agreement remained in force: the parties to a contract of employment have mutual obligations to be ready, willing and able to work, and to be ready, willing and able to pay wages; non-performance of one obligation excuses performance of the other, but it does not mean that the contract ceases to exist.

12. In his application for permission to appeal the claimant asserts that the judge failed to notice that his letter of 23 July 2021 indicated that he was unwilling to work for the defendant. The judge's point, however, was that an unwillingness to work does not of itself bring the employment contract to an end, which is a correct statement of the legal position. The claimant argues further that the defendant's failure to terminate the Employment Agreement restricted his freedom to work and violated Article 24 of the Constitution of the Republic of Kazakhstan, and that the judge's conclusion in §44 that the Agreement remained in force was unlawful and violated his civil rights and freedoms. It is not clear whether the case was argued in that way before the judge, but there is in any event no substance to it: this was an ordinary employment contract, freely entered into by the claimant; the relevant question was whether it had been terminated, and the judge's conclusion that it had not been terminated was neither arguably wrong nor unlawful nor in violation of the claimant's civil rights and freedoms.

13. At §45 the judge noted that an agreed termination did not appear beyond contemplation, and she expressed the hope that the parties could resolve this between themselves. On the face of it, such a resolution has now been achieved. The claimant has sent the defendant a further written notice, dated 29 March 2022, requesting termination of the Employment Agreement on 30 April 2022 pursuant to clause 10.4; and the defendant has supplied this Court with the defendant's written internal order, dated 19 April 2022, giving effect to that termination. But it is not necessary for this Court to reach any concluded view on the effect of those documents, which post-date the decision of the lower Court and cannot affect the correctness of that decision.

14. For the reasons summarised above, I am satisfied that an appeal in this case would have no real prospect of success. Moreover, this is plainly not a case where there exists some other compelling reason why an appeal should be heard. It follows that the claimant's application for permission to appeal must be refused.

Representation:

The Claimant was not represented

The Defendant was represented by:

1. Mr. Daniel Muzapbar, Korkem Telecom LLP;
2. Mr. Askar Issayev, Korkem Telecom LLP.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

8 November 2022

CASE No: AIFC-C/CFI/2022/0008

Private Company Minerals Operating Ltd.

Claimant

v

Private Company GEOPS Exploration Kazakhstan Ltd.

Defendant

JUDGMENT AND ORDER

Justice of the Court:

The Rt. Hon. The Lord Faulks KC

ORDER

1. The Defendant, Private Company GEOPS Exploration Kazakhstan Ltd., shall pay the Claimant, Private Company Minerals Operating Ltd., 42,339,332.94 KZT. This Order shall have immediate effect.

JUDGMENT

1. This is a claim for agency fees by the Claimant, Private Company Minerals Operating Ltd., sometimes referred to as Minerals Operating. The Defendant is Private Company GEOPS Exploration Kazakhstan Ltd., sometimes referred to as GEOPS. The Claim arises out of the conclusion of a drilling contract between the Defendant and Kazakh Altyn on the Kvartsitoviye Gorki field and Zholymbet field. The relevant contracts in relation to these two fields were completed on 9 April 2021. These are referred to as the "Kazakh Altyn agreements".

2. The Claimant relies on what is described as an "Agency agreement" dated 29 September 2020 signed by Mr. Alibek Shakirimov on behalf of the Claimant and Mr. Vassil Andreyev on behalf of the Defendant. Both gave evidence before me through interpreters respectively in Russian and Bulgarian. Neither gave much evidence which assisted in the interpretation of the contract, although both were helpful in giving the Court something of the background of the dispute.

3. The Agency agreement was concluded at the same time as the Share Purchase Agreement, whereby Mr. Andreyev acquired 30% of the charter capital of GEOPS and became what had been described by him in his witness statement as the "sole participant of GEOPS". The two agreements, and there were two agreements, reflected the next stage of the relationship that has grown up between the parties as GEOPS wanted to expand their activities in Kazakhstan. It had become very much as a joint venture, but the parties agreed that while going their separate ways, there would be continued cooperation between them as is evidenced by the Agency agreement.

4. The Claimant's case is straightforward. It is said that in accordance with the Agency agreement, it is entitled to 10% of the value of the Kazakh Altyn agreements.

5. Following an interlocutory order of mine in this case, evidence was adduced of the amount actually paid for those Kazakh Altyn agreements which were in total 423,393,329.43 KZT of which the Agency fee would then be 42,339,332.94 KZT. Those figures were provided by the Defendant. They are included in the argument given to the Court before this case and I understand that subject to liability, they are agreed or can be subject to further argument if there is any dispute.

6. The Defendants answered the Claim in a number of ways. Firstly, they said that the Agency agreement would be more properly described as a Framework agreement. In other words, it was an agreement to agree and is in effect unenforceable. I will refer to the relevant terms of the agreement. The agreement which is signed by both the principal parties, Mr. Alibek Shakirimov and Mr. Vassil Andreyev, described respectively as Agent and Principal, is an agreement with various different clauses. Clause 1 is headed "Subject of the agreement". Clause 1 sub-clause 1 follows:

"The Principal entrusts and the Agent undertakes to act as an agent and provide services for the conclusion of a drilling contract with the companies listed below, as well as with other companies in the Republic of Kazakhstan (hereinafter – the "Customer")."

In clause 1.1.1 and 1.1.2, those referenced firstly to the two fields in Kazakh Altyn, to which I have already made reference, and in 1.1.2, the reference is to Bakyrchik Mining enterprise, about which I heard no further, because it appears that it did not in fact materialise as a contract.

7. Clause 1.2 provides as follows:

"The Agent shall take measures to conclude subcontracts with the Principal, provide the Principal with all relevant necessary information and documentation on target tenders, procurements by way of request for commercial offers, through single source, give necessary explanations, organize and prepare direct contacts, meetings and negotiations of the Principal with the Customers; provide other services contributing to conclusion of Service Agreements and other agreements between the Principal and the Customers."

8. Clause 1.3 provides as follows:

"Contracts and other agreements shall be concluded directly between the Principal and the Customer. The Agent shall not have the right to sign any contracts or any other documents on behalf of the Principal, and shall not have the right to close any transactions in any form."

9. Clause 2, which I need not read in full, sets out the obligations of the Agent in familiar terms. Similarly, Clause 3 sets out the obligations of the Principal, also in familiar terms.

10. Clause 4 is important. The heading of Clause 4 is "Agency fee". It provides at Clause 4.1 as follows:

"For the provision of agency services with the conclusion of each subcontract by the Principal with the Customer, the Principal shall pay the Agent remuneration in the amount of 10 (ten) % of the prime rate of the total value of the Agreement, inclusive of VAT."

Clause 4.2:

"Relations with each individual Customer attracted by the Agent will be formalized by a separate agreement specifying the remuneration for the provision of agency services."

Clause 4.3:

"The prime rate may be changed through negotiations and agreement between the Agent and the Principal depending on the economic feasibility of the potential project."

Clause 4.4:

"Remuneration shall be paid to the Agent within 10 (ten) working days after receipt of payment from the Customer under the concluded contract."

11. It seems to me that on the proper construction of the agreement that although it is not as clear as it might be, that it is properly described as an Agency agreement, not as a Framework agreement. It was clearly envisaged that there would be a continuing relationship between the parties, one acting as a Principal and one acting as an Agent. In respect to the two named concerns, these were identified, it was clearly intended that there would be a contract entered into with Kazakh Altyn and they were named the customer, whereas other customers might or might not materialise, depending on how the relationship developed. Any such future contracts would, it seems to me, on the proper construction of Clause 4, have to be formalised by separate Agency agreements with the remuneration rate to be agreed between the parties.

12. There is common ground about this, there had been a separate specific agreement in what has been described as the Loton project, where a figure for agency of less than 10% was agreed. So, this was in accordance with the spirit and terms of the Agency agreement, although it did not feature specifically in that agreement.

13. "What was the purpose of putting in 10% of the prime rate in the agreement?" – that was the question which featured in the submissions on behalf of both the parties. The Defendants argue that it was put into the agreement on the basis that their figure was to be not less than 10% or it was a starting point or that it was in some way simply put in there as a record of what might be the rate. I do not find any of these arguments convincing. Why put 10% of the prime rate in the contract at all, if in effect, the parties were agreeing that in due course there would be an agreement about percentage rates? If the agency figure was to be agreed by reference in some way more or less to 10%, why not say so? So, it seems to me that 10% was part of the agreement in so far as the contract had been specifically identified, or the customers had been specifically identified, in the agreement. That leaves open the possibility that a different rate might have been negotiated with other customers had they materialised.

14. In his evidence, Mr. Shakirimov acknowledged that there had in fact been much talk of a drilling contract at Kazakh Altyn fields before the Agency agreement and the Shareholder agreement had in fact been concluded, hence their inclusion in the Agency agreement. Mr. Andreyev told me that the GEOPS relationship with Kazakh Altyn long predated the Agency agreement. He said that in all relevant meetings leading to the conclusion of the Kazakh Altyn agreements, it was always GEOPS representatives who were present, not those of Minerals Operating.

15. I also heard evidence from two witnesses with roles to play in Kazakh Altyn. I heard from Mr. Myrzakasimov, an employee of Kazakh Altyn. He is the Chief Geologist. His evidence was that Minerals Operating had initiated the negotiations between GEOPS and Kazakh Altyn. Minerals Operating, he said, provided the necessary information and documentation, and organised negotiations between GEOPS, Mr. Andreyev, and Kazakh Altyn. All these took place, he said, after the Agency agreement had been concluded, at the beginning of 2021 up to the time that the agreement had finally been entered into in relation to those operations with Kazakh Altyn.

16. Mr. Kaissar Yerkebulan Kaissaruly was also an employee at the relevant time of Kazakh Altyn. He is described as a Senior Geologist. He told me that he had meetings with GEOPS representatives and referred, in particular, to a meeting in December 2021 when he and others from Kazakh Altyn met

GEOPS representatives, but he pointed out that there was no one from Minerals Operating present. Although he accepted that back in May 2020 there had been meetings at which Mr. Shakirimov had been present.

17. It seems to me that whatever the degree of such contact, there had plainly been contact between Kazakh Altyn and both GEOPS and Minerals Operating. The evidence of the two geologists, taken as a whole, suggests that the Claimants were at all material times acting in accordance with the Agency agreement albeit that there would have been considerable contact between GEOPS who were actually going to do the drilling operations.

18. Mr. Shakirimov also told me that, in effect, Minerals Operating had themselves been offering to do drilling works back in May 2020. But with the intended expansion of GEOPS in September 2020, a deal was effectively done which resulted in Minerals Operating selling their 30% share as I indicated. At the same time, the Agency agreement was concluded. He also told me of the involvement of Minerals Operating leading up to the signing of the Kazakh Altyn agreements. He explained that while GEOPS had the necessary equipment and expertise for drilling, Minerals Operating had the contacts and opportunities to find customers for GEOPS. He said he had made various calls, including conference calls and WhatsApp communications after the Agency agreement had been concluded, in which he himself communicated with Kazakh Altyn. He was not sure quite how many. Two or three were suggested.

19. What is clear is that the relationship between the Claimant and the Defendant broke down. It was even suggested that threats were made at some stage on behalf of Minerals Operating and that following the breakdown, Minerals Operating acted in breach of their Agency agreement by offering themselves to provide drilling services contrary to the interests of the Principal, GEOPS.

20. There was some dispute between the parties as to whether and when precisely the Agency agreement formally came to an end. On one view, by failing to pay in accordance with the agreement, GEOPS had in effect repudiated the Agency agreement and Minerals Operating had no further obligations arising from that agreement. The duration of the Agency agreement was initially supposed to be until the end of December 2025. But both parties have plainly acted in such way that is inconsistent with the continuation of the Agency agreement. And I consider they have no continuing obligations to each other.

21. The only question that remains is whether the Claimant has established the right to 10% of the contract price in relation to those Kazakh Altyn agreements. In response to the allegations by the Defendant that the Claimant acted in breach of the Agency agreement by competing on the underground drilling work, the Claimant says in relation to the “LinkedIn” post in December 2021, this was eight months after the non-performance by the Defendant of its obligation to pay. As I have indicated, if the Defendant was in breach of its own obligation by non-payment, I do not consider that the posting of this notice can possible be regarded as a breach of the Agency agreement.

22. There was debate about whether drilling contracts generally or more specifically in this case include geological exploration and/or geological services. The Defendant argued that by the letter dated 21 of January 2021 the Claimant was offering to provide geological exploration by putting a price that was

effectively reducing the value of the contract to the Defendant, was acting not as an Agent, but in competition with the Principal.

23. This approach and the alleged threats by the Claimant, as to which that that was no admissible evidence, caused the Defendant to purport to terminate the Agency agreement by letter of 15 March 2021. It is said that this amounts to behaviour which releases the Defendant from any obligation to pay commission under the Agency agreement. The Claimant's response is firstly to deny any threats, and I am unable to find on the evidence that there were any. Secondly, to explain that once they were at one stage offering to assist in geological exploration, there was never in fact any agreement in relation to the price of geological services. In those circumstances the Claimant did not in fact become involved in the provision of such services.

24. In my judgment, nothing about the Claimants merely offering to provide the services amounts to a breach of the agreement. I do not consider it necessary to consider whether geological services would or should normally be regarded as a part of a drilling contract, because the offer did not eventuate, and it had no causative effect.

25. It follows from this that I reject the Defence and Counterclaim and return to the central question as to whether there was a concluded agreement in relation to the Kazakh Altyn fields. The Agency agreement does in my judgment amount to a concluded agreement. Both parties signed and it reflected the next stage in the companies' relationship.

26. I daresay that the Defendants consider that 10% is too much to pay for what the Claimant provided, and the point was made that the Claimant has done well financially out of the Shareholders agreement. This was elicited in evidence but that seems to me to be rather beside the point in determining what was the effect of the agreement. The fact was that the parties made a bargain. It is not unusual in agency claims for a principal to consider that an agent has been overpaid for their contribution to concluding a contract. But it must not be forgotten that sometimes agents do labour hard on behalf of the principal but may not be able to conclude agreements at all, in which case they fail to achieve entitlement to any commission.

27. It follows from my construction of the agreement and in the light of all the evidence that in my view, the Claimant is entitled to agency fees in accordance with the Agency agreement. The figure is 10%, and I indicated the figure is agreed between the parties subject to the finding that I have just made, that the Claimant is entitled to that commission. In those circumstances, I give Judgment for the Claimant in the sum claimed.

By Order of the Court,

The Rt. Hon. The Lord Faulks KC,
Justice, AIFC Court

Representation:

The Claimant was represented by Mr. Ravil Kassilgov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Republic of Kazakhstan.

The Defendant was represented by Ms. Gulnur Nurkeyeva, Partner, Grata International Law Firm, Beijing, People's Republic of China.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

25 February 2022

CASE No: AIFC-C/CFI/2022/0007

METALLINVESTATYRAU LLP

Claimant

v

AKSAYSTROY-2020 LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Lord Faulks QC

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 23 February 2022 the Claimant seeks an Order from this Court to recognise and enforce the measures set forth in paragraph 44 of the IAC Arbitration Award dated 18 February 2022 made by Ms. Indira Yeleusizova, the sole arbitrator appointed by a letter dated 3 November 2021 of Ms. Barbara Dohmann QC, the Chairman of the International Arbitration Centre of Kazakhstan, in IAC Arbitration Case No 81/2021.

2. Having read the Award it appears to me that the application is justified. Accordingly, I hereby order:

   That AKSAYSTROY-2020 LLP pay to METALLINVESTATYRAU LLP:

   1) the principal amount of 17,807,787 (seventeen million eight hundred and seven thousand seven hundred and eighty-seven) tenge;

   2) the penalty in the amount of 3,739,635 (three million seven hundred and thirty-nine thousand six hundred and thirty-five) tenge;

   3) the amount of expenses related to the resolution of the dispute in arbitration in the amount of 580,948 (five hundred and eighty thousand nine hundred and forty-eight) tenge, a registration fee in the amount of 58,340 (fifty-eight thousand three hundred and forty) tenge;

   By no later than 6pm Nur-Sultan time on Friday 11 March 2022, being 15 days from the date of this Judgment and Order.

3. The Defendant is given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By the Court,

Representation:

The Claimant was represented by Mr. Rakhat Azhgaliyev.

The Defendant was not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL

FINANCIAL CENTRE

16 March 2022

CASE No: AIFC-C/SCC/2022/0006

IZI CHAINA CORPORATE LIMITED LIABILITY COMPANY

Claimant

v

HANGZHOU AGNES TECHNOLOGY CO., LTD.

Defendant

JUDGMENT

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

1. There shall be judgment for the Claimant on the claim. The Defendant shall pay the Claimant US $ 158,480 by 6pm Nur-Sultan time on 30 March 2022.

JUDGMENT

1. In this claim, the Claimant seeks judgment for US$ 158,480 from the Defendant.

2. The parties entered into 5 contracts dated 15 February 2020, 29 June 2020 and 20 August 2020 pursuant to which the Claimant agreed to provide railway carriage of goods. The total price agreed for the services was US$ 158,480. In each case, payment was due by 30 December 2020. The Defendant failed to pay.

3. On 1 January 2021, the Defendant wrote to the Claimant, apologising for the delay in payment. The Defendant asked to postpone payment until June 2021.

4. On 2 January 2021, the parties entered into 5 agreements, deferring the date for payment until 1 June 2021. At the same time, the parties agreed to submit any disputes under the agreements to the exclusive jurisdiction agreement of the AIFC Court.

5. The Defendant subsequently failed to make any payment.

6. The Claimant issued this claim on 11 February 2022. The Defendant filed a response on 22 February 2022. The Defendant stated that it did not deny the debt in the amount of US$ 158,480. However, it claimed to be unable to pay due to the impact of coronavirus restrictions, reduced business activities and payments and delays in ports.

7. The Defendant's response amounts to an admission of the claim. On 3 March 2022, I directed the Defendant to make clear whether it was making a request for time to pay and, if so, to set out that proposal and provide supporting material.

8. On 10 March 2022, the Defendant responded, repeating its earlier response and stating that it could not provide financial statements.

9. In the circumstances, I give judgment for the Claimant in the sum claimed. I allow the usual 14 days for payment under the AIFC Court Rules, Rule 24.15. I decline to grant the Defendant further time to pay. The Defendant has not even provided a proposal, let alone evidence which could justify such a request.

By the AIFC Small Claims Court,

Tom Montagu-Smith QC
Justice, AIFC Small Claims Court

Representation:
The Claimant was represented by Mr. Lesnikov Petr, CEO of “Lesnikov, Ilyichev and Partners”. The Defendant was not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL

FINANCIAL CENTRE

16 March 2022

CASE No: AIFC-C/SCC/2022/0005

IZI CHAINA CORPORATE LIMITED LIABILITY COMPANY

Claimant

v

LACQUER CRAFT MFG CO., LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

1. There shall be judgment for the Claimant on the claim. The Defendant shall pay the Claimant US$ 153,040 by 6pm Nur-Sultan time on 30 March 2022.

JUDGMENT

1. In this claim, the Claimant seeks judgment for US$ 153,040 from the Defendant.

2. The parties entered into 5 contracts dated 10 August 2020, 17 August 2020, 1 September 2020, 15 September 2020 and 16 September 2020 pursuant to which the Claimant agreed to provide railway carriage of goods. The total price agreed for the services was US$ 153,040. In each case, payment was due by 30 December 2020. The Defendant failed to pay.

3. On 2 January 2021, the Defendant wrote to the Claimant, apologising for the delay in payment. The Defendant asked the Claimant to wait until 1 June 2021, saying "*Our company will pay you in full*".

4. On the same day, the parties entered into 5 agreements, deferring the date for payment until 28 July 2021. At the same time, the parties agreed to submit any disputes under the agreements to the exclusive jurisdiction agreement of the AIFC Court.

5. The Defendant subsequently failed to make any payment.

6. The Claimant issued this claim on 11 February 2022. The Defendant filed a response on 22 February 2022. The Defendant stated that "*the debt to [the Claimant] is 153,040 USD. For reasons beyond our control, we cannot settle with [the Claimant] until our client has paid for the goods and transportation*".

7. The Defendant's response amounts to an admission of the claim. On 3 March 2022, I directed the Defendant to make clear whether it was making a request for time to pay and, if so, to set out that proposal and provide supporting material.

8. On 10 March 2022, the Defendant responded, repeating its earlier response and stating that it could not give specific dates for payment. The Defendant further stated that it could not provide financial information about the company "*as we believe it will jeopardize confidentiality and security*".

9. In the circumstances, I give judgment for the Claimant in the sum claimed. I allow the usual 14 days for payment under the AIFC Court Rules, Rule 24.15. I decline to grant the Defendant further time to pay. The Defendant has not even provided a proposal, let alone evidence which could justify such a request.

By the AIFC Small Claims Court,

Tom Montagu-Smith QC

Justice, AIFC Small Claims Court

Representation:
The Claimant was represented by Mr. Lesnikov Petr, CEO of “Lesnikov, Ilyichev and Partners”. The Defendant was not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL

FINANCIAL CENTRE

17 March 2022

CASE No: AIFC-C/SCC/2022/0004

IZI CHAINA CORPORATE LIMITED LIABILITY COMPANY

Claimant

v

HONGKONG FONIX HITECH INDUSTRIES CO., LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

1. **There shall be judgment for the Claimant on the claim. The Defendant shall pay the Claimant US $ 98,488 by 6pm Nur-Sultan time on 30 March 2022.**

JUDGMENT

1. In this claim, the Claimant seeks judgment for US$ 98,488 from the Defendant.

2. The parties entered into 4 contracts dated 1 September 2019, 14 December 2019, 21 December 2019 and 21 February 2020 pursuant to which the Claimant agreed to provide railway carriage of goods. The total price agreed for the services was US$ 135,488. In each case, payment was due by 30 December 2020.

3. On 30 December 2020, the Defendant proposed that the debt be rescheduled, for payment in 4 instalments, between 16 February 2021 and 16 August 2021. The Claimant agreed and the parties entered into 4 agreements, recording the schedule of instalments. At the same time, the parties agreed to submit any disputes under the agreements to the exclusive jurisdiction agreement of the AIFC Court.

4. The Defendant paid the first instalment of US$ 37,000, but has failed to pay the subsequent instalments. The outstanding balance is US$ 98,488.

5. The Claimant issued this claim on 11 February 2022. The claim was supported by documents which evidence the debts due. The Defendant filed a response on 22 February 2022. The Defendant stated that it had "*partially paid the debt in the amount of 37,000 USD*" and that the "*remaining amount of 121,480 USD… will be repaid before the end of 2022. Due to the delay in the production of goods, we cannot deliver it to our client and receive money for settlement…*"

6. The Defendant's response amounts to an admission of the claim, albeit for a greater sum than is in fact claimed or due. The terms of the response appeared to me to be a request for time to pay within the meaning of the AIFC Court Rules, Rule 10.8. On 3 March 2022, I therefore directed that the Defendant make clear what proposal it was making for payment and provide supporting material. The Defendant failed to provide any response.

7. In the circumstances, I give judgment for the Claimant in the sum claimed. I allow the usual 14 days for payment under the AIFC Court Rules, Rule 24.15. I decline to grant the Defendant further time to pay. The Defendant has suggested only that payment be deferred until the end of 2022, which is far too long.

In any event, the Defendant has failed to provide any explanation or support for its request.

By the AIFC Small Claims Court,

Tom Montagu-Smith QC
Justice, AIFC Small Claims Court

Representation:
The Claimant was represented by Mr. Lesnikov Petr, CEO of “Lesnikov, Ilyichev and Partners”.
The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

18 May 2022

CASE No: AIFC-C/CFI/2022/0002

CASPIAN RESEARCH GROUP LIMITED

Applicant

v

ASTANA INVEST LLP

Respondent

JUDGMENT AND ORDER

Justice of the Court:

Justice Andrew Spink QC

ORDER

1. **The Court directs pursuant to Regulations 27(2)(a) and/or 27(6) of the AIFC Court Regulations 2017 and/or Rule 1.7 of the AIFC Court Rules 2018 that for all purposes related to and/or consequential on this Order and Judgment:**

   (a) the Claim/Application Form in Case Number AIFC-C/CFI/2022/0002 ("the Claim Form") issued on 16 February 2022 shall be deemed to be a Claim Form issued under the 'Abridged Procedure' set out in Part 23 of the AIFC Court Rules 2018 and, to the extent necessary, shall also stand as any application notice required for the purposes of making the application sought in the Claim Form;

   (b) the party named as "Claimant 2" in the Claim Form shall be deemed to be the Defendant to the claim brought by and the Respondent to the application made in the Claim Form (and to have been properly served with the Claim Form for both the bringing of the claim and, to the extent necessary, the making of the application); and

   (c) the party named as "Claimant 1" in the Claim Form shall be deemed to be the Claimant to that claim and the Applicant to that application.

2. **The Court sanctions under section 124 of the AIFC Companies Regulations 2017 the proposed arrangement for a reconstruction involving the amalgamation of the Applicant with the Respondent.**

3. **Pursuant to section 126 of the AIFC Companies Regulations 2017 the Court orders that the Respondent be amalgamated with the Applicant on the basis set out in the Amalgamation Agreement between them dated 14 February 2022.**

JUDGMENT

Introduction

1. By an application filed in Case Number AIFC-C/CFI/2022/0002 by Claim/Application Form dated 16 February 2022 ("the Claim Form"), the parties referred to in the Claim Form as (1) "Claimant 1", identified there as "Private Company Caspian Research Group Ltd" and by Business Identification Number ("BIN") 200840900235 ("the Company") and (2) "Claimant 2", identified there as "Astana Invest LLP" ("the LLP") and (in the documentation accompanying the Claim Form) by BIN 180140042013 jointly seek:

   (a) an order under section 124 of the AIFC Companies Regulations 2017 ("the AIFC Companies Regulations") sanctioning an arrangement proposed between the Company and its 100%

shareholders, Ussenov Daniyar Bekbergenovich ("the 51% Shareholder") and Naizabekova Altyngul Tolbyevna ("the 49% Shareholder") ("the Shareholders") for a reconstruction involving the amalgamation of the LLP with the Company; and

(b) an order under section 126 of the AIFC Companies Regulations giving effect to the amalgamation of the LLP with the Company (although section 126 is not expressly referred to in the application, this is the appropriate section of the AIFC Companies Regulations for the order sought in sub-paragraph (b) herein and I proceed on that basis).

Procedural matters

2. It is necessary for me to deal first with a preliminary procedural matter.

3. On its face, there is no Defendant to the claim brought by or Respondent to the application made in the Claim Form. In addition, it is not clear whether the Claim Form is intended to stand as a claim form issued pursuant to Part 4 of the AIFC Court Rules 2018 ("the AIFC Court Rules") (which sets out the general rules for commencing claims), alternatively pursuant to Part 23 of the AIFC Court Rules (which sets out the "Abridged Procedure for Claims"). The relevance of this is highlighted by Rules 6.1 and 6.2 of the AIFC Court Rules, which provide as follows in relation to the bringing of any application:

"6.1 When a party makes an application to the Court:

(a) before a claim is brought in accordance with Part 4, he shall issue and serve an Abridged Procedure Claim Form under Part 23 of the Rules, unless the Court orders otherwise;

(b) after a claim is brought in accordance with Part 4, he shall file and serve an application notice subject to the rules of this Part.

6.2 In this Part:

(1) 'application notice' means a document in which the applicant states his intention to seek a Court order; and

(2) 'respondent' means:

(a) the person against whom the order is sought; and

(b) such other person as the Court may direct."

4. If the Claim Form were to be treated by the Court as a claim form issued under Part 4 of the AIFC Court Rules not only would there have to be a defendant, who would have to be served, but various procedural steps would thereafter have to be followed following service of the Claim Form on the defendant, as set out in Part 4, including service of Particulars of Claim and a Defence in accordance with Part 11, none of which would be appropriate or necessary in a claim such as this. This claim, in which the only relief sought is an order on the single application brought under Sections 124 and 126 of the AIFC Company

Regulations and which is unlikely to involve a substantial dispute of fact is much better suited to the "Abridged Procedure for Claims" set out in Part 23 of the AIFC Court Rules (see Rule 23.1(1)).

5. Were the Claim Form to be treated by the Court as one issued under Part 23, however, this would have the knock-on effect of engaging Rule 6.1(1) in relation to the making of an application, whereby it seems tolerably clear that no separate application notice is required if the necessary application is made in the Part 23 Claim Form (whereas a separate application notice would certainly be required if the proceedings had been commenced by a Part 4 claim form: see Rule 6.1(2)).

6. Furthermore, where the Part 23 "Abridged Procedure for Claims" is used, no Defence needs to be filed (see Rule 23.4(1)(a)).

7. Significantly, there is also provision in Rule 23.6 for a Practice Direction to be made setting out circumstances in which an 'Abridged Procedure Claim Form' may be issued without naming a defendant. Although no such Practice Direction has yet been made, this confirms that, in accordance with the Overriding Objective set out in Rule 1.6 of the AIFC Court Rules, the policy underlying Rule 23.6 is to promote expeditious and efficient disposal of matters suitable for the Part 23 "Abridged Procedure for Claims" even, potentially, to the extent of disposing with the need for a Defendant altogether.

8. Absent a Practice Direction to that effect, I do not consider that the Court can proceed without a Defendant in this matter in the way contemplated specifically by Rule 23.6. However, having regard to the evident underlying policy to which I have referred, it does seem to me (and I conclude) that it is open to the Court in the exercise of its relevant management powers to direct in an appropriate case that one of the "Claimants" named in the Claim Form be deemed to be the Defendant to the claim brought and (to the extent necessary) the Respondent to the application made by the Claim Form.

9. Those case management powers are to be found in Regulations 27(2)(a) (*"(2) The Court may: (a) make orders in matters over which it has jurisdiction to make any orders it considers appropriate, including in relation to the management of cases, interim orders, and enforcement;"*) and/or 27(6) *("(6) The Court may waive any procedural requirements if it is satisfied that it is in accordance with the overriding objective to do so"*) of the AIFC Court Regulations as underpinned by Rules 1.7 and 1.8 of the AIFC Court Rules.

10. In my view, this is an appropriate case in which to take this approach because in bringing the application made in the Claim Form as one of the "Claimants", the LLP can be deemed, at least as a matter of substance, to have indicated its consent to the application being made and disposed of in the manner sought in the Claim Form and, I would add, to the Court taking all necessary steps within its powers to

facilitate that outcome. Consequently, it seems to me that no prejudice is caused – and the Overriding Objective is promoted - by making an order that puts that substantive intention into the proper procedural form. Accordingly, I propose to make the direction set out in paragraph 1 of the Order.

11. For the avoidance of doubt, paragraph 1(a) is included in the Order because Rule 23.5(1) of the AIFC Court Rules requires a Part 23 Claim Form to state that the claim is brought under the "Abridged Procedure for Claims". The Claim Form does not state this and so an order directing that it should nonetheless stand as a Part 23 Claim Form is required.

12. The consequence of paragraph 1(c) of the Order will be that it will be for the Company (as the deemed Claimant/Applicant) to take the follow-up steps required to be taken under Section 125(5) of the AIFC Companies Regulations.

The substantive application under Sections 124 and 126 of the AIFC Companies Regulations

13. I now return to the substantive application for relief under Sections 124 and 126 of the AIFC Companies Regulations.

14. The Company is a Private Company incorporated in the Astana International Financial Centre (Document 5 as listed in the Claim Form and Claim Form paragraph 3) and is a "Company" within the meaning of the AIFC Companies Regulations (see the definitions in paragraph 4 of schedule 1 to those Regulations). The Shareholders are natural persons, who are the "incorporating" and sole shareholders in the Company (Document 2 as listed in the Claim Form and the additional document subsequently submitted to the Court entitled "Protocol, Caspian Research Group 14.02.2022" being minutes of the General Meeting of the participants of the Company on 14 February 2022).

15. The LLP is a legal entity registered outside the AIFC and operating in accordance with the legislation of the Republic of Kazakhstan (Documents 4 and 7 as listed in the Claim Form). The 49% Shareholder is also the sole founder of shareholder of and/or sole participant in the LLP (Document 4 as listed in the Claim Form and the additional document subsequently submitted to the Court entitled "Protocol, Astana Invest 14.02.2022" being a Resolution of the LLP made by and on behalf of the LLP by the 49% Shareholder on 14 February 2022).

16. As outlined above and pursuant to paragraph 1 of the Court's order, the Company is the deemed Claimant to the claim brought by the Claim Form and the deemed Applicant to the application for orders under Section 124 and 126 of the AIFC Companies Regulations. The LLP is the deemed Defendant/Respondent. The application is not opposed.

17. It is stated in the Claim Form, supported by a statement of truth signed by the 51% Shareholder who states that they are duly authorised to sign that statement on behalf of the Company and in the documents listed in the Claim Form and/or provided to the Court subsequently (as referred to above and below) that the Shareholders have agreed on behalf of the Company and the 49% Shareholder together with the duly appointed "Head" and "representative" of the LLP, Zhanar Agatayeva Batyrkhanovna, have agreed on behalf of the LLP to the amalgamation of the LLP with the Company (Claim Form paragraphs 1 and 2 and documents referred to above and below).

18. Although this is not a matter addressed expressly in the Claim Form, it is to be noted:

    (a) that, while Section 124(2) of the AIFC Companies Regulations empowers the Court to order a meeting of the shareholders of the Company, no such order is required in this case because the sole shareholders have already approved the proposed procedure, as indicated above;

    (b) further, that the requirement under Section 124(3) that a majority representing three-quarters of the votes of the shareholders of the Company present and voting at the shareholders' meeting has been met (document entitled "Protocol, Caspian Research Group 14.02.2022" referred to above and below);

    (c) further that, under the "Agreement on the merger of a private company with a limited liability partnership" dated 14 February 2022 (Document 3 as listed in the Claim Form) ("the Amalgamation Agreement"),

        1. the Company undertook within the period established by law to notify in writing all the creditors of the Company known to it of the decision taken on the reorganization of the Company and LLP; and

        2. the LLP undertook to determine its creditors and debtors and within the period established by law to notify in writing all the creditors of the Company known to it of the decision taken on the reorganization of the Company and LLP.

19. Documents filed in support of the application include:

    (a) the various documents already referred to above (together with further documents referred to below), noting that some of these were provided to the Court subsequently to the Claim Form being issued and are therefore not listed in the Claim Form;

    (b) Articles of Association for the Company (Document 6 as listed in the Claim Form);

(c) Articles of Association of the LLP (Document 7 as listed in the Claim Form);

(d) a "Statement of Notification of Creditors" supported by a statement of truth signed on behalf of the Company by the 51% shareholder and on behalf of the LLP by Zhanar Agatayeva Batyrkhanovna

(provided to the Court subsequent to the Claim Form being issued);

(e) a "Statement on financial position" supported by a statement of truth signed on behalf of the Company by the 51% shareholder and on behalf of the LLP by Zhanar Agatayeva Batyrkhanovna (provided to the Court subsequent to the Claim Form being issued) to which are appended two additional documents namely notes of information on the absence (presence) of debt recorded in state authorities in respect of each of the Company and the LLP as at 13 April 2022 and 12 April 2022 respectively.

20. The Amalgamation Agreement describes an agreement between the LLP and the Company to carry out a reorganization in the form of a merger between the Company and the LLP involving a transfer of property from and all rights and obligations of the LLP to the Company. The Amalgamation Agreement expressly refers at clause 1.3 to the two "protocol" documents referred to above and states that the decisions of the Company and the LLP as recorded in those documents is the basis of the reorganization forming the subject matter of the Amalgamation Agreement.

21. I am satisfied that Section 124 of the AIFC Companies Regulations applies in this case, in that the matters summarised above constitute an arrangement proposed between the Company and its 100% shareholders, Ussenov Daniyar Bekbergenovich ("the 51% Shareholder") and Naizabekova Altyngul Tolbyevna ("the 49% Shareholder") (Section 124(1)(b)).

22. There is no application for the Court to order that a meeting of shareholders be held to vote on the proposal (Section 124(2)), and I take the view that no such order is needed, for the reason set out in paragraph 18(a) above.

23. The Court has not been informed of any objection to the proposal. Moreover the proposal appears adequately to protect the position of third parties by the transfer of all obligations of the LLP to the Company in circumstances where (a) all those creditors/contracting counterparties in respect of whom information has been provided to the Court have been notified of the proposed reorganisation ("Statement of notification of creditors" referred to in paragraph 19(d) above, which also confirms that the LLP had no receivables as at the date of the issuing of the Claim Form and that the financial position

of the Company and the LLP are stable), (b) there is no debt in either the Company or the LLP ("Statement on financial position" referred to in paragraph 19(e) above), (c) the Charter capital of the Company postreorganisation and merger will be equal to the sum of the prior capitals of the Company and the LLP (clause 3.1 of the Amalgamation Agreement), and (d) each of the Company and the LLP consent to the proposed reorganisation, and in particular to the transfer of all the LLP's obligations to the Company, the Company and the LLP having first fully disclosed to each other all of their respective assets and liabilities as identified in sub-paragraphs 23(a) and (b) herein.

24. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under Section 124(3) of the AIFC Companies Regulations.

25. Section 126 of the AIFC Companies Regulations provides that if an application is made to the Court under Section 124 for the sanctioning of an arrangement between a Company and its shareholders, *"the Court may make any orders as it considers appropriate to facilitate the ... arrangement, including a reconstruction of the Company, or an amalgamation of the Company with any other Company"*. It provides further that *"in this section Company may be taken to include a Body Corporate incorporated outside the AIFC"*.

26. This raises the question of whether the Court has power to make an order under Section 126 where, as here, one of the entities to be involved in the amalgamation, namely the LLP, is neither a *"Company"* in its primary sense of being a *"Private Company or a Public Company"* incorporated in the AIFC (as per paragraph 4 of Schedule 1 to the AIFC Companies Regulations) nor a *"Body Corporate incorporated outside the AIFC"* because it is a limited liability partnership rather than a body corporate. As to this, I respectfully agree with and adopt the approach to the making of the Section 126 part of the Order taken by Justice Sir Stephen Richards in AIFC Court Case No. AIFC-C/CFI/2021/0002 at [11] in his Judgment, where he said:

> *"The amalgamation of the LLP with the Company is at the heart of the proposed arrangement and it is appropriate in my view for the amalgamation to take place to facilitate the arrangement. An amalgamation involving a limited partnership registered outside the AIFC does not fall within the express wording of the section,* ***but that wording is not exhaustive of the forms of amalgamation that may be ordered*** *("including ... an amalgamation of the Company with any other Company"). I see no reason of principle why an order should not extend in an appropriate case to the amalgamation of a Company with a limited partnership, nor why a limited partnership registered outside the AIFC should be in any worse a position in that respect than a body corporate incorporated outside the AIFC."* (emphasis added)

27. I therefore conclude that the Court should make an order under Section 126 of the AIFC Companies Regulations that the LLP be amalgamated with the Company on the basis set out in the Amalgamation Agreement between them dated 14 February 2022 (Document 3 as listed in the Claim Form).

By the Court,

Andrew Spink QC,
Justice, AIFC Court

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

28 April 2022
CASE No: AIFC-C/CFI/2022/0001

The Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan

Claimant

v

JSC Cengiz Insaat Sanayi ve Ticaret A.S.

Defendant

JUDGMENT

Justice of the Court:
Justice Sir Rupert Jackson

ORDER

1. **The Court orders that the Claimant, the Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan, must pay on or before 30 September 2022, the Judgment debt in the amount of 1,335,170,336 tenge, in the Judgment dated 16 November 2021 in Case No. AIFC-C/CFI/2021/0005 of 2021 JSC Cengiz Insaat Sanayi ve Ticaret A.S. v. The Committee for Roads of the Ministry of Industry and Infrastructure development of the Republic of Kazakhstan.**

JUDGMENT

1. This is the Judgment of the Court on application by the Claimant, the Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan, dated 10 February 2022 to postpone the execution of the decision of the Court of the Astana International Financial Centre for No. AIFC-C/CFI/2021/0005 dated 16 November 2021 on the recovery of debts in the amount of 1,335,170,336 tenge from the Committee in favor of JSC “Cengiz Insaat Sanayi ve Ticaret A.S.” until the end of 2022.

2. I have carefully considered the submissions of both parties.

3. The Committee for Roads is at fault in failing to take prompt steps to secure funds to meet the judgment dated 16 November 2021. On the other hand, the present position is that as a result of that fault the Committee is not currently able to pay the judgment debt.

4. I do not accept that the Committee needs a year in order to secure the necessary funds. There are procedures which need to be followed, but if the Committee moves promptly, it will be able to secure the necessary funds by 30 September 2022.

5. The Court grants an extension of time until 30 September 2022 for payment of the judgment debt. The Court orders that the Committee for Roads must pay the judgment debt on or before 30 September 2022.

By Order of the Court,

Sir Rupert Jackson,
Justice, AIFC Court

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

10 March 2022, addendum added on 25 April 2022

CASE No: AIFC-C/SCC/2021/015

BASTAU BUILD GROUP LLP

Claimant

v

SHEGEBAYEV ERKIN TEMIRTASOVICH

Defendant

JUDGMENT

Justice of the Court:

Justice Charles Banner QC

FIRST ORDER

1. **The application for interim relief is dismissed.**

2. **The claim shall be dismissed unless within 14 days of this Order the Claimant amends its Details of Claim to seek a remedy that is within the jurisdiction of the AIFC Court.**

3. **If the claimant submits amended Details of Claim the Defendant shall have 14 days to provide his response which shall be in the manner provided for by rule 28.12 of the AIFC Court Rules.**

FIRST JUDGMENT

Background

1. This claim arises out of a construction contract, entitled Construction Agreement No. 9 ("the **Agreement**") and dated 15th July 2013 and subsequently varied by Supplementary Agreement No. 1 dated 15th August 2013 ("**the 2013 Supplementary Agreement**"). Under the Agreement as varied, the Claimant contracted to build a residential building for the Defendant on Land Plot 269, Telman Residential Area, Nur-Sultan (**"the Property"**). Title to the Property had been registered in the Defendant's name on 23rd November 2012.

2. The price payable by the Defendant to the Claimant under the Agreement as varied was 113,661,260 Tenge. The Defendant made an advance payment of 22,732,252 Tenge prior to commencement of the works.

3. It is common ground between the Claimant and the Defendant that:

    1) The works provided for by the Agreement were duly completed; and

    2) the Defendant has not paid the remaining amount of 90,929,000 Tenge and that he remains obliged to pay the Claimant this sum.

4. Article 651 of the Civil Code of the Republic of Kazakhstan is entitled "Construction Contract". At paragraph (4) it provides:

    "The owner of the construction in progress until its delivery to the customer and payment for work is the contractor."

5. On 28th August 2020, the Claimant and the Defendant entered into a mediation agreement ("**the Mediation Agreement**"), pursuant to which the Defendant purported to transfer all rights in the Property to the Claimant in full and final settlement of his debt.

6. Prior to this, however, the Claimant's former wife, Ms Asiya Damirovna Mukhanbetova had obtained an order dated 28th July 2020 from the Yessil District Court of Nur-Sultan City to the effect that the ownership in the Property was to be divided equally between her and the Defendant.

7. Ms Mukhanbetova subsequently applied for the cancellation of the Mediation Agreement. This application was granted by the Almaty District Court of Nur-Sultan city in a decision dated 14th September 2021. The Claimant says it was not given a proper opportunity to participate in those proceedings.

8. By agreement dated 1st December 2021 the Claimant and the Defendant entered into a Supplementary Agreement ("**the 2021 Supplementary Agreement**") which, amongst other things, recorded their agreement that:

    1) The Defendant debt to the Claimant for the completed works under the Agreement is 90,929,000 Tenge;

    2) A penalty for late payment, amounting to 37,868,818 Tenge, was also due;

    3) The Defendant would pay these sums to the Claimant no later than 10th December 2021;

    4) Any dispute under the Agreement, the 2013 Supplementary Agreement or the 2021 Supplementary Agreement is subject to the exclusive jurisdiction of the AIFC Court.

    5) The applicable law is the substantive law of the Republic of Kazakhstan.

9. It is common ground that the Defendant did not make these payments by 10th December 2021 or at all.

The proceedings before the AIFC Court

10. On 29th December 2021 the Claimant commenced proceedings in the AIFC Court against the Defendant. Ms Mukhanbetova, who was not a party to the 2021 Supplementary Agreement, was not named as a Defendant, although paragraph 2 of the Details of Claim stated that she *"could be involved in this case as a third party"*.

11. The remedy sought by the Claimant in the Claim Form is not the sums recorded by the 2021 Supplementary Agreement as due to be paid by the Defendant by 10th December 2021. Instead the Claimant asks the Court:

    "To recognize for "Bastau Build Group" LLP the right of ownership (law of property) to the object of unfinished construction – at the address Nur-Sultan city, Almaty district, Telman residential area, plot 269 (current name is Ivan Panfilov street, house 6/10".

12. The Claimant also asks the Court to grant the following interim relief "immediately after receiving this claim":

    - "the imposition of a ban and suspension of the actions of private court bailiff of the executive district of the city of Nur-Sultan Kaimuldinov Arman Kaliollaevich related to the levy of execution on property, namely: on a land plot with an area of 0,1525 hectares (cadastral number 21:318:088:1010) with unfinished construction property located at the city of Nur-Sultan,Almaty district, in the Telman residential area, plot number 269 (current name is lvan Panfilov street, house 6/10), committed in enforcement proceedings No' 865 / 20-71-3431 from October22, 2020 to recover from Shegebaev Erkin Temirtasovich in favor of Mukhanbetova Asiya Damirovna in the amount of 265,607,514 tenge;

    - suspension of trading through the electronic trading platform for the sale of seized property on the territory of the Republic of Kazakhstan held by the Republican Chamber of Private Bailiffs of the Republic of Kazakhstan for the sale of property, namely: a land plot with on area of 0'1525 hectares (cadastral number 21:318:088:1010) with unfinished construction located at the city of Nur-Sultan, AImaty district, in the Telman residential area, plot number 269 (current name is lvan Panfilov street, house 6/10);

- the imposition of bans and the suspension of any registration actions in the Non-Commercial Joint stock company "State Corporation" Government for Citizens with the property: land plot with an aera of 0.1525 hectares (cadastral number 21:318:088:1010) with unfinished construction property located at the address of Nur-Sultan, Almaty district, in the Telman residential area, plot number 269 (current name is Ivan Panfilov street, house 6/10)."

13. On 15th February 2022, the Defendant filed a document entitled "Statement on Recognition of the Claim". This is not an Admission filed in accordance with Part 10 of the AIFC Court Rules or a Small Claim Defence filed under rule 28.12, but for present purposes the Court treats it as the Defendant's position in relation to the claim.

14. In this statement, the Defendant accepts that he has not paid the moneys due to the Claimant, and concludes *"I consider the claim of Bastau Build Group LLP justified and hereby recognize it in full."*

15. The sums due by the Defendant to the Claimant are equivalent to between 150,000 and 300,000 US Dollars. Accordingly, the claim falls under rule 28.2 of the AIFC Court Rules, which provides that the AIFC Small Claims Court ("**the SCC**") will hear claims in this value range if *"all parties elect in writing that it be heard by the SCC".* The Claimant and Defendant have so elected and therefore the claim falls to be determined by the SCC. Neither party has requested a hearing.

Determination

16. If the remedy sought in the Claim Form had been an order requiring the Defendant to pay the sums recognised by the 2021 Supplementary Agreement as due to be paid by 10th December 2021, the Defendant's acknowledgement that the claim was justified would have been the end of the matter and the Court would have simply allowed the claim in the terms sought.

17. However, that is not the position.

18. It is plain that the application for interim relief instead seeks the Court to take steps which go very considerably beyond the jurisdiction conferred on it in relation to this matter by the 2021 Supplementary Agreement, both in terms of the nature of the relief sought and in terms of the persons against whom it is sought. That application is dismissed.

19. As for the final remedy sought, as the claim is currently framed that too invites the Court to exceed the jurisdiction conferred on it by the 2021 Supplementary Agreement, since the order sought would affect the rights of Ms Mukhanbetova, who is not a party to the 2021 Supplementary Agreement nor a party to these proceedings.

20. In the circumstances, the Court invites the Claimant to amend its Details of Claim so that the remedy sought is one which is within the jurisdiction of the Court. If it does not do so within 14 days, the Claim shall be dismissed without the need for any further order. If amended Details of Claim are filed, the Defendant shall have 14 days thereafter to respond. That response should be in accordance with rule 28.12 of the AIFC Court Rules. The Court will consider any amended Details of Claim and the Defendant's response on the papers.

ADDENDUM ORDER

1. **The claim as amended is allowed.**

2. **The Defendant shall pay the Claimant the sum of 128,787,862 Tenge within 28 days of this Adddendum Order.**

ADDENDUM JUDGMENT

1. Following the Court's earlier judgment in this matter ("**the First Judgment**") and accompanying order, the Claimant submitted an Amended Claim From on 24 March 2022, in which it now seeks the sum of 128,787,862 Tenge from the Defendant pursuant to the Supplementary Agreement (comprised of the two amounts referred to at paragraph 8(1)-(2) of the First Judgment).

2. On 4th April 2022 the Defendant wrote to the Court indicating that he accepted that the claim as amended was "*justified*" and that "*I… recognize it in full"*.

3. The Claim as amended seeks a remedy that is within the Court's jurisdiction. It is not contested. The Court therefore allows it and requires the Defendant to pay the amount claimed within 28 days.

By the AIFC Small Claims Court,

Charles Banner QC,
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Mr. Vali Musalayev, BASTAU BUILD GROUP LLP

The Defendant was represented by Mr. Erkin Shegebayev.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

1 March 2022

CASE No: AIFC-C/SCC/2021/014

KOSTANAI MINERALS JSC (KAZAKHSTAN)

Claimant

v

FACTORY DNEPROPETROVSKAYA VOLNA OJSC (UKRAINE)

Respondent

JUDGMENT

Justice of the Court:

Justice Charles Banner QC

ORDER

1. **The Claim is allowed.**

2. **The Defendant shall pay the Claimant 133,875 US Dollars within 7 days of this Order.**

JUDGMENT

Introduction

1. This claim arises out of an agreement dated 4th January 2018, entitled Contract 04/01 ("**the Contract**"), between the parties to these proceedings, pursuant to which the Claimant undertook to supply specified chemical goods to the Defendant at a price of 573,750 US Dollars.

2. On 12th February 2018, the parties entered into an additional agreement, varying the Contract so as to provide for the supply of additional chemical goods to the Defendant. The overall price payable by the Defendant was increased to 1,644,750 US Dollars.

3. Clause 3.1 of the Contract provided that delivery of the goods could be made in whole or in parts until the full fulfilment of the terms of the Contract. Clause 5.2 required the Claimant to issue an invoice for the goods for each delivered batch. Clause 5.3 required the Defendant to make payment within 90 days from the date of shipment.

4. On the basis of the Contract, in the period from 26th February 2018 to 19th April 2019, the Claimant delivered chemical goods to the Defendant to the value of 541,875 US Dollars.

5. During 2018 and 2019 the parties agreed several further variations to Contract providing for deferred payment by the Defendant.

6. The Defendant made a partial payment to the Claimant in the sum of 100,000 US Dollars on 20th May 2019. It did not, however, make any further payments.

7. The Claimant subsequently commenced proceedings against the Defendant in the Economic Court of the Zaporozhye region of Ukraine. On 1st June 2020, that Court ordered the Defendant to pay the Claimant the sum of 308,000 US Dollars. This sum was duly paid.

8. In November 2021 a mediation between the parties took place at the AIFC International Arbitration Centre. The outcome of this mediation was an agreement between the parties dated 15th November 2021 ("**the Mediation Agreement**"), pursuant to which the Defendant agreed to pay the Claimant the remaining sum due under the Contract of 133,875 US Dollars no later than 22nd November 2021. The Mediation Agreement records that both parties were represented at the mediation and that they had read and understood the terms of the Mediation Agreement.

9. Clause 7 of the Mediation Agreement provides that any dispute in relation to the agreement shall be subject to the exclusive jurisdiction of the AIFC Court. Clause 7.1 provides that the applicable law is the substantive law of the Republic of Kazakhstan.

Procedural background

10. On 27 December 2021 the Claimant filed a Claim Form and accompanying documents at the AIFC Court, contending that the Defendant had not paid it the sum of 133,875 US Dollars, in breach of the Mediation Agreement, and asking the Court to order that the Defendant do so. No claim is made for interest.

11. The claim falls within the jurisdiction of the AIFC Small Claims Court ("**SCC**") given that its value is below the threshold specified in Rule 28.2(1) of the AIFC Court Rules.

12. Rule 28.12 of the AIFC Court Rules provides:

> "Within 14 days after he is served with a Small Claim Form, a defendant shall:
>
> (1) Admit the claim by filing and serving on the claimant an admission in accordance with Part 10;
>
> (2) File a Small Claim Defence to the claim setting out:
>
> (a) which parts of the claim are admitted;
>
> (b) which parts are denied and his reasons for denying those parts; and
>
> (c) the details of any counterclaim; or
>
> (3) Make an application to dispute the jurisdiction of the SCC in accordance with Part 6
>
> and in every case shall provide an email address for service and state his residential address. Where the defendant is not an individual, he shall state the address at which he carries on business."

13. Given the disturbances in Kazakhstan in January 2022, the Court granted the Defendant an extension of time for compliance with Rule 28.12 until 15th February 2022.

14. That date has now passed, and the Defendant has taken none of the steps to which Rule 28.12 refers. It has indicated to the Court that it does not intend to file a Defence. It has not suggested that recent events either in Kazakhstan or in Ukraine have precluded it from having a fair opportunity to consider and respond to the claim within the extended timeframe provided for by the Court.

Determination

15. The Court has proceeded to determine the claim based upon the material provided by the Claimant, and is satisfied that:

1) the Defendant was obliged under the Mediation Agreement to pay the Claimant the sum of 133,875 US Dollars by 22nd November 2021;

2) the Defendant has not done so and this sum remains unpaid; and

3) the provisions of the Civil Code of the Republic of Kazakhstan cited by the Claimant (Articles 272, 273, 438 and/or 469) mean that this sum is due.

16. The Claim is therefore allowed. The Court orders the Defendant to pay the Claimant 133,875 US Dollars. Given the history of delayed payment and non-engagement by the Defendant in this case so far, the Court requires this sum to be paid within 7 days.

Costs

17. Rule 26.9 of the AIFC Court Rules provides:

> "The SCC may not order a party to a small claim to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except:
>
> (1) such part of any Court fees paid by that other party as the SCC may consider appropriate;
>
> (2) and such further costs as the SCC may assess by the summary procedure and order to be paid by a party who has behaved unreasonably."

18. The Claimant was not required to pay a Court fee in this case. It has not applied for its costs of legal representation in these proceedings. The Court observes, however, that the kind of persistent failure and delay in complying with legal and procedural obligations demonstrated by the Defendant in this case, in particular the unexplained failure to comply with the terms of the Mediation Agreement coupled with the equally unexplained failure to comply with Rule 28.12, may well in a future case lead to a finding of unreasonable behaviour so as to justify an award of costs under Rule 26.9(2).

By the AIFC Small Claims Court,

Charles Banner QC,
Justice, AIFC Small Claims Court

Representation:

The Claimant was represented by Yerzhanbayev Serik Saparovich, Head of the Legal Department, Kostanai Minerals JSC

The Defendant was represented by Igor Kyrychenko, SC Factory "Dnepropetrovskaya Volna"

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

10 March 2022

CASE No: AIFC-C/CFI/2021/0012

UNICORN CROPS LIMITED PRIVATE COMPANY

Applicant

v

(1) KIALY AGRO-10 LIMITED LIABILITY PARTNERSHIP
(2) NOVOKUBANSKOYE LIMITED LIABILITY PARTNERSHIP
(3) SENIM ZHER LIMITED LIABILITY PARTNERSHIP
(4) ARKA ZERENDI LIMITED LIABILITY PARTNERSHIP
(5) KAMAGRO LIMITED LIABILITY PARTNERSHIP

Respondents

JUDGMENT AND ORDER

Justice of the Court:

Justice Andrew Spink QC

ORDER

1. **The Court directs pursuant to Regulations 27(2)(a) and/or 27(6) of the AIFC Court Regulations 2017 and/or Rule 1.7 of the AIFC Court Rules 2018 that for all purposes related to and/or consequential in this Order and Judgment:**

   (a) the Claim/Application Form in Case Number AIFC-C/CFI/2021/0012 ("the Claim Form") issued on 20 December 2021 shall be deemed to be a Claim Form issued under the "Abridged Procedure for Claims" set out in Part 23 of the AIFC Court Rules 2017 and, to the extent necessary, shall also stand as any application notice required for the purposes of making the application sought in the Claim Form;

   (b) the parties named as "Claimant 2", "Claimant 3", "Claimant 4", "Claimant 5" and "Claimant 6" in the Claim Form shall be deemed to be the Defendants to the claim brought by and the Respondents to the application made in the Claim Form (and to have each been properly served with the Claim Form for both the bringing of the claim and, to the extent necessary, the making of the application); and

   (c) the party named as "Claimant 1" in the Claim Form shall be deemed to be the Claimant to that claim and the Applicant to that application.

2. **The Court sanctions under section 124 of the AIFC Companies Regulations 2017 the proposed arrangement for a reconstruction involving the amalgamation of the Applicant with each of the Respondents.**

3. **Pursuant to section 126 of the AIFC Companies Regulations 2017 the Court orders that each of the Respondents be amalgamated with the Applicant on the basis set out in the five Amalgamation Agreements between the Applicant and each of the Respondents each of which is dated 23 August 2021.**

JUDGMENT

Introduction

1. By an application filed in Case Number AIFC-C/CFI/2021/0012 by Claim/Application Form dated 20 December 2021 ("**the Claim Form**"), the parties referred to in the Claim Form as (1) "Claimant 1", identified there as "Unicorn Crops Limited Private Company" and by Business Identification Number ("BIN") 190940900125 ("**the Company**"), (2) "Claimant 2", identified there as "Kialy Agro-10 Limited Liability Partnership" and by BIN 020240004012 ("**LLP 1**"), (3) "Claimant 3" identified there as "Novokubanskoye Limited Liability Partnership" and by BIN 000240002964 ("**LLP 2**"), (4) "Claimant 4" identified there as "Senim Zher Limited Liability Partnership" and by BIN 990540004311 ("**LLP 3**"), (5) "Claimant 5" identified there as "Arka Zerendi Limited Liability Partnership" and by BIN 011040005490 ("**LLP 4**") (also referred to in the documentation referred to in the Claim Form as "Arka Zerendy Limited Liability Partnership"), and (6) "Claimant 6" identified there as "Kamagro Limited Liability Partnership" and by BIN 011040005578 ("**LLP 5**") jointly seek:

   (a) an order under section 124 of the AIFC Companies Regulations 2017 ("**the AIFC Companies Regulations**") sanctioning an arrangement proposed between the Company and its 100% shareholder, Unicorn Holdings Limited (BIN 190940900125) ("**the Shareholder**") for a reconstruction involving the amalgamation of each of LLP 1, LLP 2, LLP 3, LLP 4 and LLP 5 with the Company; and

   (b) an order under section 126 of the AIFC Companies Regulations giving effect to the amalgamation of each of LLP 1, LLP 2, LLP 3, LLP 4 and LLP 5 with the Company (although section 126 is not expressly referred to in the application, this is the appropriate section of the AIFC Companies Regulations for the order sought in sub-paragraph (b) herein and I proceed on that basis).

Procedural matters

2. It is necessary for me to deal first with a preliminary procedural matter.

3. On its face, there is no Defendant to the claim brought by or Respondent to the application made in the Claim Form. In addition, it is not clear whether the Claim Form is intended to stand as a claim form issued pursuant to Part 4 of the AIFC Court Rules 2018 ("the AIFC Court Rules") (which sets out the general rules for commencing claims), alternatively pursuant to Part 23 of the AIFC Court Rules (which sets out the "Abridged Procedure for Claims"). The relevance of this is highlighted by Rules 6.1 and 6.2 of the AIFC Court Rules, which provide as follows in relation to the bringing of any application:

"6.1 When a party makes an application to the Court:
(1) before a claim is brought in accordance with Part 4, he shall issue and serve an Abridged Procedure Claim Form under Part 23 of the Rules, unless the Court orders otherwise;
(2) after a claim is brought in accordance with Part 4, he shall file and serve an application notice subject to the rules of this Part.

6.2 In this Part:
(1) 'application notice' means a document in which the applicant states his intention to seek a Court order; and
(2) 'respondent' means:
(a) the person against whom the order is sought; and
(b) such other person as the Court may direct."

4. If the Claim Form were to be treated by the Court as a claim form issued under Part 4 of the AIFC Court Rules not only would there have to be a defendant, who would have to be served, but various procedural steps would thereafter have to be followed following service of the Claim Form on the defendant, as set out in Part 4, including service of Particulars of Claim and a Defence in accordance with Part 11, none of which would be appropriate or necessary in a claim such as this. This claim, in which the only relief sought is an order on the single application brought under Sections 124 and 126 of the AIFC Company Regulations and which is unlikely to involve a substantial dispute of fact is much better suited to the "Abridged Procedure for Claims" set out in Part 23 of the AIFC Court Rules (see Rule 23.1(1)).

5. Were the Claim Form to be treated by the Court as one issued under Part 23, however, this would have the knock-on effect of engaging Rule 6.1(1) in relation to the making of an application, whereby it seems tolerably clear that no separate application notice is required if the necessary application is made in the Part 23 Claim Form (whereas a separate application notice would certainly be required if the proceedings had been commenced by a Part 4 claim form: see Rule 6.1(2)).

6. Furthermore, where the Part 23 "Abridged Procedure for Claims" is used, no Defence needs to be filed (see Rule 23.4(1)(a)).

7. Significantly, there is also provision in Rule 23.6 for a Practice Direction to be made setting out circumstances in which an "Abridged Procedure Claim Form" may be issued without naming a defendant. Although no such Practice Direction has yet been made, this confirms that, in accordance with the Overriding Objective set out in Rule 1.6 of the AIFC Court Rules, the policy underlying Rule 23.6 is to promote expeditious and efficient disposal of matters suitable for the Part 23 "Abridged Procedure for Claims" even, potentially, to the extent of disposing with the need for a Defendant altogether.

8. Absent a Practice Direction to that effect, I do not consider that the Court can proceed without a Defendant in this matter in the way contemplated specifically by Rule 23.6. However, having regard to the evident underlying policy to which I have referred, it does seem to me (and I conclude) that it is open

to the Court in the exercise of its relevant management powers to direct in an appropriate case that one or more of the "Claimants" named in the Claim Form be deemed to be the Defendant or Defendants to the claim brought and (to the extent necessary) the Respondent or Respondents to the application made by the Claim Form.

9. Those case management powers are to be found in Regulations 27(2)(a) (*"(2) The Court may: (a) make orders in matters over which it has jurisdiction to make any orders it considers appropriate, including in relation to the management of cases, interim orders, and enforcement;"*) and/or 27(6) (*"(6) The Court may waive any procedural requirements if it is satisfied that it is in accordance with the overriding objective to do so"*) of the AIFC Court Regulations as underpinned by Rules 1.7 and 1.8 of the AIFC Court Rules.

10. In my view, this is an appropriate case in which to take this approach because, as stated above in paragraph 5 of this Judgment, in bringing the application made in the Claim Form as five of the "Claimants", each of LLP 1, LLP 2, LLP 3, LLP 4 and LLP 5 can be deemed, at least as a matter of substance, to have indicated its consent to the application being made and disposed of in the manner sought in the Claim Form and, I would add, to the Court taking all necessary steps within its powers to facilitate that outcome. Consequently, it seems to me that no prejudice is caused – and the Overriding Objective is promoted - by making an order that puts that substantive intention into the proper procedural form. Accordingly, I propose to make the direction set out in paragraph 1 of the Order.

11. For the avoidance of doubt, paragraph 1(a) is included in the Order because Rule 23.5(1) of the AIFC Court Rules requires a Part 23 Claim Form to state that the claim is brought under the "Abridged Procedure for Claims". The Claim Form does not state this and so an order directing that it should nonetheless stand as a Part 23 Claim Form is required.

12. The consequence of paragraph 1(c) of the Order will be that it will be for the Company (as the deemed Claimant/Applicant) to take the follow-up steps required to be taken under Section 125(5) of the AIFC Companies Regulations.

The substantive application under Sections 124 and 126 of the AIFC Companies Regulations

13. I now turn to the substantive application for relief under Sections 124 and 126 of the AIFC Companies Regulations.

14. The Company is a Private Company incorporated in the Astana International Financial Centre (Document 1) and is a "Company" within the meaning of the AIFC Companies Regulations (see the definitions in paragraph 4 of schedule 1 to those Regulations). The Shareholder is also an AIFC incorporated Private

Company and is the sole shareholder in the Company (Document 2 and Claim Form Details of Claim/Application paragraph 2). The Company in turn holds the following percentage of the shares in the charter capital of each of the LLPs: LLP 1 - 99%; LLP 2 - 99%; LLP 3 – 99.09%; LLP 4 – 98.977%; LLP 5 - 99% (Documents 6, 5, 4, 8 and 7 respectively), each of which is a limited liability partnership registered under the legislation of the Republic of Kazakhstan (Document 3).

15. As outlined above and pursuant to paragraph 1 of the Court's order, the Company is the deemed Claimant to the claim brought by the Claim Form and the deemed Applicant to the application for orders under Section 124 and 126 of the AIFC Companies Regulations. Each of the five LLPs is a deemed Defendant/Respondent. The application is not opposed.

16. It is stated in the Claim Form Details of Claim/Application, supported by a statement of truth signed by the Company's authorised legal representative, Shynggys Beibituly Oralbayev, a Senior Associate of Grata Law Firm LLP, that the Shareholder and the Company have made an arrangement for the amalgamation of the LLPs with the Company (paragraph 3) and that the Shareholder has resolved that the LLPs should amalgamate with the Company (paragraph 6), the Company has resolved to amalgamate with the LLPs (paragraph 7) and that the participants in each of the LLPs, in each of which the Company is the majority shareholder, have resolved to amalgamate with the Company, to approve and conclude the relevant Agreement on Amalgamation applicable to each LLP, to notify their creditors of their amalgamation with the Company and to register the termination of their LLP activity upon amalgamation with the Company (paragraph 8).

17. It is also stated in the Claim Form Details of Claim/Application (paragraph 10) that the individual participants in the LLPs, who number in excess of 1,200 will receive between them, as part of the amalgamation process, a total of 3,000 "preferred shares of Class B" in the Company each of which share will have a nominal value of 600 USD.

18. Although this is not a matter addressed expressly in the Claim Form Details of Claim/Application, it is to be noted:

    (a) that, while Section 124(2) of the AIFC Companies Regulations empowers the Court to order a meeting of the shareholders of the Company, no such order is required in this case because the sole shareholder has already approved the proposed procedure, as indicated above;

    (b) further, that the requirement under Section 124(3) that a majority representing three-quarters of the votes of the shareholders of the Company present and voting at the shareholders' meeting has been met.

19. Documents filed in support of the application include:

(a) the Company's standard Articles of Association (Document 1);

(b) the resolution of the shareholders of the Shareholder confirming, amongst other matters, the Shareholder's decision to amalgamate the LLPs with the Company, to approve each of the five Agreements on Amalgamation on behalf of the Company and to notify the Company's creditors about the amalgamation (Document 2);

(c) the resolution of the Shareholder on behalf of the Company in like terms to the resolution referred to in paragraph 20(b) above (Document 3);

(d) minutes of the Extraordinary General Meetings of the participants in each of the LLPs each held on 23 August 2021 approving the resolutions summarised in paragraph 17 above (Documents 4 to 8);

(e) notifications to the creditors of each of the LLPs about the amalgamation (Documents 9 to 99):

(f) the five Agreements on Amalgamation between the Company and each of the LLPs, dated 23 August 2021 (Documents 100 to 104).

20. Each of the Agreements on Amalgamation dated 23 August 2021 describes an agreement between the relevant LLP and the Company to undertake a "reorganisation process" involving the amalgamation of the LLP with the Company with a transfer of all the LLP's rights and obligations to the Company, such that the Company will become the legal successor of the relevant LLP to all the obligations of the LLP (Clause 6.1) after which each LLP will be excluded from the National Register of Business Identification Numbers of the Republic of Kazakhstan (Clause 6.2). Each Agreement on Amalgamation also contains a summary of the basic financial data set out in the balance sheets of the Company and the relevant LLP (Clauses 3.1 and 3.2). Such basic financial data relating to the Company and all of the five LLPs is also set out in each of the notifications to creditors referred to in paragraph 19(e) above.

21. I am satisfied that Section 124 of the AIFC Companies Regulations applies in this case, in that the matters summarised above constitute an arrangement proposed between the Company and its 100% shareholder, Unicorn Holdings Limited (Section 124(1)(b)).

22. There is no application for the Court to order that a meeting of shareholders be held to vote on the proposal (Section 124(2)), and I take the view that no such order is needed, since the information provided to the Court is that a meeting has already been held at which the Shareholder (being the sole shareholder in the Company) has already passed a resolution in favour of the proposal (Documents 2 and 3).

23. The Court has not been informed of any objection to the proposal. Moreover the proposal appears adequately to protect the position of third parties by the transfer of all obligations of the LLP to the Company in circumstances where (a) all those creditors in respect of whom information has been provided to the Court have been notified of the transfer by each LLP to the Company of that LLP's respective liabilities owed to each of those creditors, (b) each of those creditors has been notified of the basic financial data on the balance sheets of the Company and all of the LLPs, (c) the Court has not been informed of any objection having been received from any creditors, and (d) the Company and each of the LLPs consent to the proposal, and in particular to the transfer of all of each LLP's obligations to the Company, the Company and the relevant LLP having disclosed to each other in the Agreement on Amalgamation basic financial data from each of their respective balance sheets.

24. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under Section 124(3) of the AIFC Companies Regulations.

25. Section 126 of the AIFC Companies Regulations provides that if an application is made to the Court under Section 124 for the sanctioning of an arrangement between a Company and its shareholders, *"the Court may make any orders as it considers appropriate to facilitate the ... arrangement, including a reconstruction of the Company, or an amalgamation of the Company with any other Company"*. It provides further that *"in this section Company may be taken to include a Body Corporate incorporated outside the AIFC"*.

26. This raises the question of whether the Court has power to make an order under Section 126 where, as here, some of the entities to be involved in the amalgamation, namely each of the LLPs, is neither a *"Company"* in its primary sense of being a *"Private Company or a Public Company"* incorporated in the AIFC (as per paragraph 4 of Schedule 1 to the AIFC Companies Regulations) nor a *"Body Corporate incorporated outside the AIFC"* because it is a limited liability partnership rather than a body corporate. As to this, I respectfully agree with and adopt the approach to the making of the Section 126 part of the Order taken by Justice Sir Stephen Richards in AIFC Court Case No. AIFC-C/CFI/2021/0002 at [11] in his Judgment, where he said:

> *"The amalgamation of the LLP with the Company is at the heart of the proposed arrangement and it is appropriate in my view for the amalgamation to take place to facilitate the arrangement. An amalgamation involving a limited partnership registered outside the AIFC does not fall within the express wording of the section,* ***but that wording is not exhaustive of the forms of amalgamation that may be ordered*** *("including ... an amalgamation of the Company with any other Company"). I see no reason of principle why an order should not extend in an appropriate case to the amalgamation*

of a Company with a limited partnership, nor why a limited partnership registered outside the AIFC should be in any worse a position in that respect than a body corporate incorporated outside the AIFC." (emphasis added)

27. I therefore conclude that the Court should make an order under Section 126 of the AIFC Companies Regulations that the LLPs be amalgamated with the Company on the basis set out in the Amalgamation Agreement between them dated 23 August 2021.

28. For the avoidance of doubt, the orders made by the Court necessarily serve also to confirm acceptance by the Court of jurisdiction to make the orders sought in the application (see paragraph 1 of Section 3 of the Claim Form "Remedy Sought").

By the Court,

Andrew Spink QC, Justice, AIFC Court